

**Pratt Towers, Inc. and Lawrence Folkes and Keith Robinson and Local 32B-32J, Service Employees International Union, AFL-CIO.** Cases 29-CA-22657, 29-CA-22660, and 29-CA-22666

September 30, 2002

**DECISION AND ORDER**

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On September 27, 2000, Administrative Law Judge Jesse Kleiman issued the attached decision, and on October 19, 2000, he issued an Errata to his decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, as explained below, and to adopt the recommended Order as modified and set forth in full below.

The primary issue raised by the Respondent's exceptions is whether the judge correctly found that it violated Section 8(a)(3) and (1) of the Act by refusing to reinstate its six striking employees unless they abandoned their support for the Union. The Respondent argues, *inter alia*, that it was not obligated to reinstate the employees because the strike was illegal from its inception and because the strikers engaged in misconduct. We agree with the Respondent that the strikers in this case forfeited the special *Laidlaw*<sup>2</sup> reinstatement rights of strikers because they engaged in an unprotected strike.<sup>3</sup> Nonetheless, for the reasons stated below, we conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by indicating its willingness to hire these employees on conclusion of the strike and then unlawfully conditioning that employment on the former strikers' abandonment of the Union as their collective-bargaining representative.<sup>4</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel's motion to strike the Respondent's exceptions in their entirety, as well as its brief, is denied.

<sup>2</sup> *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970).

<sup>3</sup> See *Mackay Radio & Telegraph Co.*, 96 NLRB 740, 741-742 (1951).

<sup>4</sup> It is unnecessary to address the judge's findings (1) that the Respondent violated Sec. 8(a)(5) by bargaining in bad faith with the Union; (2) that the Respondent violated Sec. 8(a)(2) by rendering unlawful assistance to another labor organization; and (3) that these complaint

**I. BACKGROUND**

**A. The Union's Strike**

At all material times, the Respondent employed a staff of six long-tenured maintenance employees who were considered by management to be excellent workers. On April 21, 1998, the Board certified the Union as their exclusive collective-bargaining representative. The Union and the Respondent subsequently met on four occasions in an unsuccessful attempt to negotiate a collective-bargaining agreement.

At the end of the final session on January 7, 1999,<sup>5</sup> the Union stated that if the Respondent did not accept the proposal then on the bargaining table, the Union would strike. The Union's proposed contract included a picket line clause, but the clause had not been discussed by the parties during their negotiations.<sup>6</sup>

The Respondent refused to sign the proposed contract, and the Union struck on February 22. All six maintenance employees participated in the strike. An object of the strike was to compel the Respondent to sign the Union's proposed contract.

**B. The Employees Request Reinstatement**

On March 11, three of the striking employees met with the Respondent and asked to return to work. According to the credited testimony, the Respondent replied that the employees could not return to work until they obtained a letter from the Union stating that it no longer represented them. One employee repeatedly asked if the strikers could return to work without this letter. The Respondent consistently answered, "no." The Respondent told the employees that it needed a letter from the Union stating that all ties were severed between the employees and the Union in order to get the Respondent out of its legal obligation to bargain with the Union.

---

allegations are not barred by Sec. 10(b). The Respondent's exceptions to these three findings do not meet the minimum requirements of Sec. 102.46(b) of the Board's Rules. The Respondent merely cites to the judge's decision and fails to allege with particularity on what grounds the judge's purportedly erroneous findings should be overturned. In these circumstances, we find, in accordance with Sec. 102.46(b)(2), that the Respondent's exceptions on these points may be disregarded. See *Oak Tree Mazda*, 334 NLRB 110 (2001).

The Respondent argues in its exceptions that the judge improperly "forfeit[ed its] attorney-client privilege without a legal basis" by admitting into evidence a December 8, 1998 management report to the board of directors which contained legal advice from company counsel. Because this alleged error relates solely to the 8(a)(2) and (5) violations which, as discussed above, have not been presented to us through properly filed exceptions, we find no merit in the Respondent's argument.

<sup>5</sup> All dates refer to 1999 unless otherwise specified.

<sup>6</sup> The picket line clause provided as follows: "No employee covered by this agreement should be required by the Employer to pass picket lines established by any Local of the Service Employees International Union in an authorized strike."

On March 15, two additional employees met with the Respondent and made unconditional offers to return to work. The Respondent again replied that the employees would have to get a letter from the Union stating that the employees no longer wanted the Union to represent them.

Also on March 15, the sixth employee telephoned the Respondent and stated that he wanted to return to work. The Respondent told this employee that he would have to withdraw from the Union before he could return to work.

#### C. The March 16 Board of Directors Meeting

On March 16, the Respondent held an emergency meeting of its board of directors and its counsel, Kevin McGill. The judge specifically found that the Respondent made its decision not to reinstate the strikers at the March 16 meeting. In so finding, the judge relied on the tape and minutes of the March 16 meeting, which were introduced into evidence.

At the March 16 meeting, Valerie Brooks, president of the board, informed the directors that “all of the men have come back for their jobs.” She then stated:

*We don’t want that. Somehow we were talking to Kevin McGill about, you know, the conditions and circumstances under which we could, you know, make that arrangement, okay? And then we need to know what happens, May 1st [the end of the certification year] is approaching so we need to know where we are so we can stall them, or you know, what our positions is [sic]. So, he was saying if we could prove misconduct on the part of one of the men, then that would be grounds not to have to take them back, okay?*

Toward the middle of the meeting, McGill advised the board that “when we tell these individuals that we are not going to offer them reinstatement,” charges will be filed with the NLRB. The tape of the meeting records Property Manager Eunice Johnson stating that “since it’s the opinion of the board members that we’re not going to take any of these gentlemen back, we can prolong it as much as we can.” The judge viewed the statements by McGill and Johnson as clearly indicating that a decision had already been made by the Respondent not to reinstate the striking employees.

By letter dated March 16, the Respondent advised all six employees that it was investigating reports of misconduct which occurred during the course of the strike. The letter stated that when the investigation was concluded, the Respondent would inform the employees of its response to their requests for reinstatement.

#### D. Events Between March 16 and 23

Sometime between March 16 and 23, McGill advised Brooks that the evidence of strike misconduct was “questionable,” “not concrete,” and “not sufficient.” During this time period, McGill began reviewing the Union’s proposed contract looking for illegal or nonmandatory clauses.

McGill’s review led him to conclude that the strike was illegal or unprotected. During a board meeting on March 23, the Respondent’s directors were advised for the first time that the strike may have been illegal.

#### E. The March 24 Letter Denying Reinstatement

On March 24, the Respondent sent each striker a letter denying the request for reinstatement. The letter stated in pertinent part as follows:

This is to advise you that the Board of Directors of Pratt Towers has voted to deny your request for reinstatement. This action is based upon our conclusion that the strike was not a protected strike under applicable law. In addition, strikers engaged in serious misconduct during the course of the strike.

#### F. The Judge’s Decision

The judge found that all six strikers engaged in a protected economic strike, that they made unconditional offers to return to work on March 11 and 15, and that the Respondent had not hired permanent replacements. The judge further found that the Respondent told these employees that in order to be considered for reinstatement they had to get a letter from the Union stating that they no longer were represented by the Union, and that the reason the Respondent sought these letters was that “it wanted to get out from the [Union’s] certification any way it could.” Accordingly, the judge concluded that the Respondent unlawfully conditioned the strikers’ reinstatement upon their abandoning the Union, and providing the Respondent with written proof by letter that all ties with the Union had been severed and the Union no longer represented them.

The judge found no merit in the Respondent’s two affirmative defenses. First, the judge considered and rejected the Respondent’s argument that serious strike misconduct formed the basis for its refusal to reinstate the striking employees. In this connection, the judge emphasized that the decision to deny the employees reinstatement was made at the March 16 board of directors meeting, “before [the Respondent] had concluded, or perhaps even begun, its alleged misconduct investigation.” Thus, the judge found that, as of March 16, the Respondent lacked an honest belief that any strikers engaged in serious misconduct. Further, the Respondent admitted at the

hearing that three employees did not engage in any misconduct whatsoever, yet the Respondent denied their requests for reinstatement anyway. With respect to the remaining three employees, the judge found that the alleged misconduct that the Respondent attributed to them either did not occur or was not serious in nature. In sum, the judge concluded that the “record evidence makes clear that the Respondent’s [strike misconduct] explanations for denying the strikers reinstatement are pretextual. They either do not exist . . . or were not, in fact, relied upon.”

The judge then turned to the Respondent’s second affirmative defense, i.e., that the strike was not protected because an object was to compel the Respondent to agree to the illegal picket line clause and other provisions that were either unlawful or nonmandatory subjects of bargaining. The judge again stressed that “the Respondent made its determination to deny reinstatement to the striking employees on March 16, 1999. As of this time, the Respondent had not raised or discussed the idea of the possibility that the strike was unlawful.” Because the board of directors decided to deny the employees reinstatement before they knew of the possible illegality of the strike, the judge concluded that that factor could not have played any role in their decisionmaking.

In any event, the judge concluded that the strike did not have an illegal object. The judge cited to his prior decision in *Service Employees Local 32B-32J (Pratt Towers)*, Case 29–CC–1285 [337 NLRB 317 (2001)], in which he found that the picket line clause in the Union’s proposed agreement was prohibited by Section 8(e) of the Act, but that there was insufficient evidence to establish that an object of the strike was to force or require Pratt Towers to enter into an agreement containing the picket line clause.

Accordingly, having rejected the respondent’s affirmative defenses, the judge concluded that the respondent violated Section 8(a)(3) and (1) by refusing to reinstate the six maintenance employees unless and until they abandoned their support for the Union.

#### G. The Board’s Decision in Case 29–CC–1285

On December 20, 2001, the Board issued its decision in Case 29–CC–1285. *Service Employees Local 32B-32J (Pratt Towers) (Pratt Towers I)*, 337 NLRB 317 (2001). The Board agreed with the judge that the picket line clause was prohibited by Section 8(e). Contrary to the judge, however, the Board concluded that an object of the strike was to force or require Pratt Towers to enter into a contract containing the picket line clause. Therefore, the Board concluded that the union violated Section 8(b)(4)(ii)(A) of the Act by engaging in a strike that had

as an object forcing or requiring Pratt Towers to enter into an agreement prohibited by Section 8(e).

#### II. ANALYSIS

In cases involving an employer’s discharge or refusal to reinstate strikers for having engaged in alleged acts of misconduct, the General Counsel, as a threshold matter, has the burden to establish that the employees had engaged in a protected strike and that the employer’s disciplinary action resulted from conduct associated with the strike.<sup>7</sup> Once the General Counsel has established a prima facie case of discrimination, the burden shifts to the Respondent to prove that the strikers forfeited their *Laidlaw* rights under the Act by engaging in unlawful picketing, or other strike or picket line misconduct.<sup>8</sup> The Board has held that an employer only has to demonstrate an honest belief that its employees were guilty of this kind of strike misconduct in order to justify the discipline imposed on them.<sup>9</sup> If the employer can satisfy its burden of showing its honest belief that unprotected conduct had occurred, the General Counsel then has the opportunity to prove that the strikers did not engage in the misconduct that the Respondent has attributed to them.<sup>10</sup>

There is no dispute in this case that all six alleged discriminatees participated in the strike against the Respondent. Further, as stated above, the Board found in *Pratt Towers I*, supra, that the union violated Section 8(b)(4)(ii)(A) of the Act by striking with an object of forcing or requiring the respondent to execute a collective-bargaining agreement containing a provision prohibited by Section 8(e).<sup>11</sup> Therefore, the General Counsel cannot establish that the strike was protected.

<sup>7</sup> *Laredo Coca Cola Bottling Co.*, 258 NLRB 491, 496 (1981).

<sup>8</sup> *Rapid Armored Truck Corp.*, 281 NLRB 371 fn. 1, 381–382 (1986); *Teamsters Local 707 (Claremont Polychemical Corp.)*, 196 NLRB 613, 614–615 (1972); and *Mackay Radio & Telegraph Co.*, supra at fn. 3.

<sup>9</sup> *Virginia Mfg. Co.*, 310 NLRB 1261, 1271 (1993), enf’d. 27 F.3d 565 (4th Cir. 1994).

<sup>10</sup> *Champ Corp.*, 291 NLRB 803, 805 (1988), enf’d. 933 F.2d 688, 700 (9th Cir. 1990), cert. denied 502 U.S. 957 (1991).

<sup>11</sup> In light of the holding of *Pratt Towers I* that the union’s strike was illegal because an object was to force or require Pratt Towers to enter into a contract containing a picket line clause prohibited by Sec. 8(e), we find it unnecessary to pass on the respondent’s contention that the strike was unlawful on the additional ground that the union conditioned the reaching of an agreement on two nonmandatory subjects of bargaining (the evergreen clause and the office of contract arbitrator clause).

The Respondent also argues that the strike was illegal on the ground that an object was to obtain an unlawful union-security clause. In this connection, the judge found that the respondent advised the union on October 8, 1998, that the union-security clause in its proposed contract “may not be legal.” During negotiations, the union pointed out to the respondent that the second paragraph of that clause provided that in the event the clause is deemed unlawful for some reason, it would be interpreted only in a lawful manner. The judge found that this was the only time that the issue of the union-security clause arose during the course

Because the Union's strike was unlawful from its inception, "the strikers forfeited their rights to the protections of the Act" under *Mackay*, supra at 742, and therefore forfeited all rights to reinstatement. In this regard, it is irrelevant that at the time the Respondent decided to terminate the strikers it was unaware of the illegal nature of the strike. The dispositive factor here is the Board's finding in the prior case that the strike was unlawful from its inception. This is because the statutory rights of the striking employees are tied to their participation in that illegal strike and not to the respondent's knowledge that they had engaged in unprotected conduct. As the Board held in *Mackay*:

. . . the employees who participated in the *unlawful* strike of the kind herein found may not invoke the protection of the Act because they were denied permanent reinstatement at the end of that strike, even though the Respondent may have failed to assert the illegality of the strike as the basis for denying reinstatement to such strikers. [Emphasis in original.]

96 NLRB at 743.<sup>12</sup> Thus, based on the strikers' participation in the unlawful strike, the Respondent was privileged to deny employment to all six former strikers when they sought to return to work.

An employer may not, however, refuse to employ an applicant for unlawful reasons. Here, the credited evidence establishes that the Respondent was willing to hire the six former strikers, but only if they renounced the Union. Thus, on March 11, the Respondent told three strikers that they could not work until they obtained a letter from the Union stating that it no longer represented them. On March 15, the Respondent told two other strikers who sought work that they needed to provide a letter from the Union stating that these former employees no longer desired union representation. Further, the Respondent told the sixth former striker, also on March 15, that he would have to withdraw from the Union before the Respondent would employ him.

The Respondent's statements to the former strikers requiring them to abandon the Union amounted to so-called "yellow-dog contracts." As the Board stated in *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991):

Even before passage of the Wagner Act, Congress enacted broad prohibitions against yellow-dog

contracts. It is axiomatic that such agreements and their solicitation are barred under the 8(a)(1) prohibition of coercion directed at employee exercise of rights protected by Section 7. [Footnote omitted.]

Thus, the Board has long held that it is unlawful for an employer to force or require its employees to sign yellow-dog contracts as the Respondent attempted to do here.<sup>13</sup> We therefore conclude that, in these unique circumstances, the Respondent's refusal to employ the strikers violated Section 8(a)(3) and (1) of the Act. Accordingly, we shall require the Respondent to offer employment to these individuals with full backpay from the date that it unlawfully conditioned their employment on renunciation of the Union.<sup>14</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Pratt Towers, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Refusing to hire applicants unless and until they abandoned their support for Local 32B-32J, Service Employees International Union, AFL-CIO (the Union).

(b) Rendering unlawful assistance to Local 2, New York State Independent Union of Building Service Employees and Factory Workers (Local 2) or any other labor organization by volunteering to recognize Local 2 or any other labor organization as the bargaining representative of the Respondent's employees at a time when the Union is the certified bargaining representative of these employees.

(c) Engaging in a predetermined and planned course of action designed to undermine the status of the Union, as the exclusive bargaining representative of the Respondent's employees in the appropriate unit, and to convince the employees that it would be futile to continue to support the Union and in their best interests to abandon the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

<sup>13</sup> See *Carlisle Lumber Co.*, 2 NLRB 248, 266 (1936), enf'd. as mod. 94 F.2d 138 (9th Cir. 1937), cert. denied 304 U.S. 575 (1938) (employer violated the Act by imposing its "yellow dog" policy, pursuant to which it refused to hire any of its striking employees unless they renounced their union affiliations).

<sup>14</sup> We shall modify the judge's recommended Order to conform to our findings and to our decisions in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and *Excel Container*, 325 NLRB 17 (1997). We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB 175 (2001).

of negotiations and that the respondent was satisfied with the union's response. Accordingly, we find no merit in the respondent's contention.

<sup>12</sup> See also *Rapid Armored Truck Corp.*, supra at 373 fn. 8, where the Board approved the judge's finding that picketers could not invoke the protections of the Act, even though the employer had not relied on the illegality of their conduct as a basis for denying them reinstatement.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Keith Robinson, Lawrence Folkes, Theorgy Brailsford, Curtis Bailey, Angel Venzen, and Jude Obaseki reinstatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

(b) Make Keith Robinson, Lawrence Folkes, Theorgy Brailsford, Curtis Bailey, Angel Venzen, and Jude Obaseki whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Keith Robinson, Lawrence Folkes, Theorgy Brailsford, Curtis Bailey, Angel Venzen, and Jude Obaseki and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(d) On request, bargain with the Union, as the exclusive bargaining representative of the Respondent's employees in the following appropriate unit, and for 12 months thereafter as if the certification year had not expired, concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time building service employees employed by the Respondent at 333 Lafayette Avenue, Brooklyn, New York, excluding all guards and supervisors as defined in Section 2(11) of the Act.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on

forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1999.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN, concurring.

In the apt words of the judge, this case involves the efforts of a Respondent determined to "get out from under the [Board's] certification [of the Union] any way it could." The primary means used by the Respondent to accomplish its illegal objective was to refuse to reinstate its striking employees unless they submitted written proof that they had renounced the Union as their bargaining representative. The judge found that the Respondent's conduct violated Section 8(a)(3) and (1) of the Act, and my colleagues agree. I, too, join my colleagues in affirming the judge's unfair labor practice findings, but I write separately because I reach that result by a somewhat different path.<sup>1</sup>

#### I.

The relevant facts are well stated in the majority opinion and will only be briefly summarized here. In April 1998, the Union won a Board election and was certified as the bargaining representative of the Respondent's six maintenance employees. It is undisputed that the Respondent considered the maintenance staff to be excellent employees.

Negotiations for an initial contract were unsuccessful. In February 1999, the Union called a strike in support of

---

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations."

<sup>1</sup> The judge also found that the Respondent violated Sec. 8(a)(5) by bargaining in bad faith with the Union and Sec. 8(a)(2) by rendering unlawful assistance to another labor organization. I agree with my colleagues that there are no proper exceptions to these unfair labor practice findings. Therefore, I join my colleagues in affirming the judge.

---

<sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judge-

its proposed collective-bargaining agreement. All six maintenance employees participated in the strike.

The Union's proposed contract contained an overbroad "picket line clause" prohibited by Section 8(e).<sup>2</sup> This clause was not discussed, objected to, or even referred to at any time during the negotiations. Nevertheless, because an object of the strike was to compel the Respondent to sign the Union's proposed contract, and because the proposed contract included the clause prohibited by Section 8(e), the Union's strike was unlawful. Specifically, the Union violated Section 8(b)(4)(ii)(A) of the Act, which makes it an unfair labor practice for a labor organization to threaten, coerce, or restrain any person, where an object is "forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e)." The Board so held in *Pratt Towers I*, supra, which issued in December 2001.

The Respondent, however, was completely unaware of this legal technicality when the six strikers unconditionally offered to return to work on March 11 and 15, 1999. Although the Respondent had not hired permanent replacements, it did not reinstate the strikers. Instead, the Respondent repeatedly told the employees that they could not return to work unless they abandoned their support for the Union and provided the Respondent with written proof to that effect. The judge specifically found, with full support in the record, that "the actual reason the Respondent sought such letters from the Union by the employees was because it was fully aware of its obligation, under the Board certification of [the Union] as the bargaining representative of its employees, to bargain with that Union, and it wanted to get out from under the certification any way it could . . . ."

The judge also found that the Respondent then "searched for [a] reason" to justify the decision it had already made. Over the course of the next several days, the Respondent fabricated two such "reasons," which it listed in its March 24 letter to the employees formally denying them reinstatement: "the strike was not a protected strike under applicable law" and "strikers engaged in serious misconduct during the strike."

## II.

In a comprehensive decision, the judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate its six striking employees

<sup>2</sup> The picket line clause provided as follows: "No employee covered by this agreement should be required by the Employer to pass picket lines established by any Local of the Service Employees International Union in an authorized strike." As the Board explained in *Service Employees Local 32B-32J (Pratt Towers)* (*Pratt Towers I*), 337 NLRB 317 (2001), the language of the clause is overbroad because it protects refusals to cross any picket line, whether primary or secondary.

unless they abandoned their support for the Union. The judge rejected as pretextual the Respondent's affirmative defenses that the strike was illegal from its inception and that the strikers engaged in serious misconduct.

In its exceptions, the Respondent argues that "the ALJ erred by refusing to apply the dual motivation analysis mandated by the Board in *Wright Line*."<sup>3</sup> He performed only one-half of it." According to the Respondent, if the judge had properly applied the complete *Wright Line* analysis, he would find that the strikers were lawfully terminated.

## III.

Under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf'd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), economic strikers must be reinstated upon application, absent a legitimate and substantial justification, such as permanent replacement. In *Pratt Towers I*, however, the Board held that the union's strike was not a protected economic strike, but an illegal strike that violated Section 8(b)(4)(ii)(A) of the Act. Therefore, I agree with my colleagues that *Laidlaw* does not apply here.

If this is not a *Laidlaw* case, what is the proper framework for analysis? I agree with the Respondent that *Wright Line* supplies the answer to that question.

It is well settled that the employer's motivation in Section 8(a)(3) cases is of central importance. As the Supreme Court stated almost 50 years ago in *Radio Officers' Union v. NLRB*, 347 U.S. 17, 44 (1954): "That Congress intended the employer's purpose in discriminating to be controlling is clear."

"The mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination." *J. P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1980). For, "the pivotal factor is motive," *NLRB v. Lipman Bros.*, 355 F.2d 15, 20 (1st Cir. 1966), and the ultimate "determination which the Board must make is one of fact—what was the *actual motive* of the discharge." *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969) (emphasis in original).

To resolve 8(a)(3) cases turning on motivation, the Board uses the analysis set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel has the initial burden to show that antiunion animus was a motivating factor in the employer's decision. 251 NLRB at 1089.

<sup>3</sup> 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

If this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Id.* “[W]here an administrative law judge has evaluated the employer’s explanations for its action and concluded the reasons advanced by the employer were pretextual,” then the employer has failed to satisfy its *Wright Line* burden. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982). “For a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.” *Id.*

Applying these principles here, I would find that the General Counsel satisfied his initial *Wright Line* burden. Even though the employees participated in an illegal strike and could have been lawfully denied reinstatement for that reason, the Respondent was not privileged to discriminate against them on the basis of other conduct that the Act protects. Yet that is precisely what occurred. Thus, the credited testimony clearly shows that all six employees unconditionally offered to return to work on March 11 and 15, but the Respondent told them that they could not be reinstated unless they presented proof that the Union no longer represented them. There can be no doubt that the employees’ desire for continued representation by their incumbent Union is protected by Section 7. Where, as here, “an employer’s representatives have announced an intent to . . . retaliate against an employee for engaging in protected activity, the Board has before it especially persuasive evidence” of unlawful motivation. *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985). Thus, I would find that the General Counsel has made a very strong showing that the Respondent’s animus against the employees’ continued support for the Union was a motivating factor in the decision not to reinstate them.

Therefore, under *Wright Line*, the burden shifts to the Respondent to demonstrate that it would have refused to reinstate the six employees even in the absence of their support for the Union. Before the judge, the Respondent argued that it was privileged not to reinstate the employees because (1) they engaged in strike misconduct and (2) the strike itself was illegal. However, the record supports the judge’s key finding that neither of these reasons was actually relied on when the Respondent denied the strikers reinstatement. Thus, the judge correctly found that when the Respondent decided to deny the strikers reinstatement, (1) the Respondent lacked an honest belief that they had engaged in serious misconduct, and (2) the Respondent was not even aware that the strike was ille-

gal.<sup>4</sup> Accordingly, as the judge has correctly found the Respondent’s explanations to be mere pretexts, I conclude that the Respondent has failed to satisfy its *Wright Line* burden.

The Respondent, however, makes one further argument that needs to be addressed. In essence, the Respondent argues that regardless of an employer’s motive, it is not an unfair labor practice for an employer to refuse to reinstate strikers engaged in an unlawful strike. According to the Respondent, the “Board has long held that employees engaged in an unlawful strike forfeit any right to reinstatement.” Close examination of Board precedent, however, reveals that it does not support the Respondent’s forfeiture argument.

It is true that in *Mackay Radio & Telegraph Co.*, 96 NLRB 740–741 (1951), the first case cited by the Respondent, the Board stated that “the strikers forfeited the protection of the Act by engaging in an unlawful strike and that it would not effectuate the policies of the Act to order that they be reinstated.” That statement, however, cannot be divorced from its context. *Mackay Radio* involved a strike “called and prosecuted, at least in substantial part,” to compel the respondents to violate Section 8(a)(3) of the Act by agreeing to an unlawful union-security provision. 96 NLRB at 741. The General Counsel contended that the respondents condoned the employees’ participation in the strike and therefore could not assert the illegality of the strike as a basis for not reinstating the strikers. The Board, however, refused to apply the condonation doctrine to participants in a strike which, in an appropriate proceeding, would have been found to have been unlawful under Section 8(b)(2). 96 NLRB at 742–743. The Board distinguished prior precedent applying the condonation doctrine on the ground that the record in *Mackay Radio* “clearly demonstrated the strikers’ determination to compel the Respondents to violate the Act.” 96 NLRB at 742 fn. 7. The Board limited its holding to the particular facts of the case: “We decide no more than is required by the facts in this case: namely, that the employees who participated in the *unlawful* strike of the kind herein found may not invoke the protection of the Act because they were denied permanent reinstatement at the end of that strike, even though the Respondents may have failed to assert the illegality of the strike as the basis for denying reinstatement to such strikers.” 96 NLRB at 743 (emphasis in original).<sup>5</sup>

<sup>4</sup> See, e.g., *Philips Industries*, 295 NLRB 717, 718 (1989) (“An employer cannot be motivated by facts of which it is not aware.”).

<sup>5</sup> In two subsequent cases not cited by the Respondent, the Board refused to extend *Mackay Radio* to strikes alleged to be in violation of Sec. 8(b)(1)(A) and (4)(D), respectively. *Union Twist Drill Co.*, 124

*Mackay Radio* is distinguishable on the ground that the Board did not find there, as the judge found here, that the employer's actual motive in denying the strikers reinstatement was "to get out from under the [Union's] certification any way it could." Nothing in *Mackay Radio* privileged the Respondent to utilize the employees' request to return to work as leverage to relieve itself of its statutory obligation to recognize and bargain with the Union. Where, as here, the evidence affirmatively shows that the Respondent's motive was unlawful, *Mackay Radio* does not bar the finding of a violation of the Act.<sup>6</sup>

I also find distinguishable the next Board case that the Respondent cites: *Teamsters Local 707 (Claremont Polychemical Corp.)*, 196 NLRB 613 (1972). Although the Board's decision contains dicta supportive of the Respondent's position when considered in isolation,<sup>7</sup> the facts of that case show that—unlike here—the employer actually relied on the strikers' participation in picketing prohibited by Section 8(b)(7)(B) as the basis for denying them reinstatement. See 196 NLRB at 627 and 628. Therefore, *Claremont Polychemical* does not constitute a precedent establishing that the Respondent may prevail on its illegal strike defense even though that factor played no role whatsoever in its decision not to reinstate the employees. Indeed, as discussed above, here the evidence affirmatively shows that the Respondent's decision not to reinstate the strikers was based on the fact that they would not disavow the Union, an impermissible consideration.

Finally, in *Nassau Insurance Co.*, 280 NLRB 878 (1986), and *Rapid Armored Truck Corp.*, 281 NLRB 371 (1986), the Board found that employees who participated in illegal strikes and picketing were lawfully denied reinstatement. These cases are distinguishable because in

NLRB 1143 (1959); *Marquette Cement Mfg. Co.*, 219 NLRB 549, 552–553 (1975). The effect of these two cases was to reinforce *Mackay Radio*'s self-imposed limitation to its precise facts. Thus, extant Board law does not broadly hold that employees who participate in an unlawful strike of any kind forfeit their rights to reinstatement.

<sup>6</sup> *Mackay Radio* was a divided Board decision with a strong dissent, which sharply criticized the majority opinion on both legal and policy grounds. 96 NLRB at 746–748. Furthermore, *Mackay Radio* appears to be inconsistent with the statute itself, which provides for loss of protected status for employees engaging in one kind of unlawful strike and one kind of unlawful strike only (strikes in violation of a Sec. 8(d) notice period). However, because I find *Mackay Radio* to be distinguishable on the ground set forth above, I need not reach the issue of whether it should be overruled. For the same reason, I need not decide whether *Mackay Radio* can also be distinguished on the basis of the particular Section of the Act alleged to be violated by the union's strike. See the cases cited in fn. 5, supra.

<sup>7</sup> "[W]here the activity engaged in by the employee is the participation in an activity which contravenes the policies of the Act the employee has forfeited his right to invoke other provisions of the same statute to restore him to his job with backpay." 196 NLRB at 614.

neither one was there a finding (or even a contention) that the employer's defense was a mere pretext to conceal an unlawful motive.

In conclusion, I reject the Respondent's forfeiture argument as based on an unduly broad reading of Board precedent. I apply instead the well-established principle that "if the employer [discriminates against] an employee for having engaged in union activities and . . . if the reasons that he proffers are pretextual, the employer commits an unfair labor practice." *Transportation Management*, supra, 462 U.S. at 398. For all the reasons set forth above, I would find that the Respondent refused to reinstate its six maintenance employees because they would not abandon their support for the Union. I also reject the Respondent's defenses as pretexts. Accordingly, I conclude that the Respondent's refusal to reinstate the six employees violated Section 8(a)(3) and (1) of the Act.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire applicants unless and until they abandon their support for the Union.

WE WILL NOT render unlawful assistance to Local 2, New York State Independent Union of Building Service Employees and Factory Workers or any other union at a time when our employees are represented by Local 32B-32J, Service Employees International Union, AFL-CIO (the Union).

WE WILL NOT engage in a predetermined and planned course of conduct designed to undermine the status of the Union and to convince our employees that it would be futile to continue to support the Union and would be in their best interests to abandon the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Keith Robinson, Lawrence Folkes, Theurgy Brailsford, Curtis Bailey, Angel Venzen, and Jude Obaseki instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

WE WILL make Robinson, Folkes, Brailsford, Bailey, Venzen, and Obaseki whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, less interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Robinson, Folkes, Brailsford, Bailey, Venzen, and Obaseki, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

WE WILL, on request, bargain with the Union, as the exclusive bargaining representative of our employees in the following appropriate unit, and for 12 months thereafter as if the certification year had not expired, concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time building service employees employed by us at 333 Lafayette Avenue, Brooklyn, New York, excluding all guards and supervisors as defined in Section 2(11) of the Act.

#### PRATT TOWERS, INC.

*Nancy K. Reibstein, Esq.*, for the General Counsel.

*Kevin J. McGill, Esq. and Jennifer M. Crook, Esq. (Clifton Budd & DeMaria, LLP)*, for the Respondent.

*Ira A. Sturm, Esq. (Raab, Sturm & Goldman, LLP)*, for the Union.

#### DECISION

##### STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of charges filed by Lawrence Folkes and Keith Robinson on April 1, 1999, and Local 32B-32J, Service Employees International Union, AFL-CIO (Local 32B-32J or the Union), on April 6, 1999, in Cases 29-CA-22657, 29-CA-22660, and 29-CA-22666, respectively, against Pratt Towers, Inc. (the Respondent), a consolidated complaint and notice of hearing was issued on May 17, 1999,<sup>1</sup> alleging that the Respondent violated

Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by refusing to reinstate its striking employees unless and until they abandoned their support for the Union. By answer timely filed on May 25, 1999, the Respondent denied the material allegations in the consolidated complaint.

A hearing was held before me in Cases 29-CA-22657, 29-CA-22660, and 29-CA-22666 (CA cases), in Brooklyn, New York, from July 15 through August 13, 1999. By motion made during the trial, counsel for the General Counsel moved to amend the consolidated complaint to allege that (1) the Respondent violated Section 8(a)(2) of the Act by rendering unlawful assistance to Local 2, New York State Independent Union of Building Service Employees and Factory Workers (Local 2), by volunteering to recognize Local 2 at a time when the Respondent's unit employees were represented by Local 32B-32J; and (2) the Respondent violated Section 8(a)(1) and (5) of the Act by engaging in a predetermined and planned course of conduct designed to undermine the status of Local 32B-32J as the exclusive collective-bargaining representative of the Respondent's unit employees, and to convince these employees that it would be futile to continue to support Local 32B-32J and would be in their best interests to abandon this Union. The Respondent raised objections to the amendments and denied these allegations. I granted the General Counsel's motion to amend the consolidated complaint as set forth above.

At the trial in the CA cases, the Respondent amended its answer to admit that on or about February 22, 1999, all of its unit employees, except for the superintendent,<sup>2</sup> went out on strike, and that in or about mid-March 1999, all the then-striking unit employees made a verbal, unconditional offer to return to their former positions of employment. The Respondent additionally amended its answer to admit that Eunice Johnson, its site manager, is an "agent of the Respondent" for the purpose of the day-to-day operations, "but not for the purpose at issue in the trial, namely the issue of strikers reinstatement." The Respondent also admitted that Valerie Brooks, the Respondent's presi-

29-CC-1285, alleging that Local 32B-32J violated Sec. 8(b)(4)(ii)(A) of the Act by engaging in a strike with the object of forcing Pratt Towers to sign a bargaining contract containing a clause prohibited by Sec. 8(e) of the Act. The clause in question involved a "picket line" clause. On May 21, 1999, Local 32B-32J filed its timely answer denying the material allegations in the complaint.

By Order dated May 17, 1999, the consolidated complaint in Cases 29-CA-22657, 29-CA-22660, and 29-CA-22666, and the complaint in Case 29-CC-1285 were ordered to be heard consecutively. After the close of the consolidated CA cases, Case 29-CC-1285 was heard and closed on August 16, 1999. Subsequently all the parties filed briefs. By motion dated February 24, 2000, Local 32B-32J moved to dismiss the complaint in Case 29-CC-1285 for failure "to establish . . . a violation of the Act." Both the General Counsel and Pratt Towers opposed the motion. By Order dated March 24, 2000, I reserved decision on this motion. On May 16, 2000, I issued my decision in Case 29-CC-1285 in which I found that the picket line clause in the proposed agreement violated Sec. 8(e) of the Act, but that there was insufficient evidence in the record to establish a violation of Sec. 8(b)(4)(A) of the Act. I therefore recommended dismissal of the complaint in this case.

<sup>2</sup> The building superintendent, while a bargaining unit employee, was on leave due to an injury he sustained on the job in January 1999, and he did not participate in the strike.

<sup>1</sup> Also on May 17, 1999, a complaint and notice of hearing issued upon the basis of a charge filed by Pratt Towers, Inc. against Local 32B-32J, Service Employees International Union, AFL-CIO, in Case

dent of its board of directors and chief executive officer, was an agent of the Respondent as was Johnson, “for certain purposes, but not for the purposes at issue in this Complaint,” and that Brooks was empowered by the Respondent’s board of directors to effectuate the Respondent’s policies.

Moreover, the parties stipulated that the Respondent’s building maintenance employees, Curtis Bailey, Theorgy Brailsford, Lawrence Folkes, Jude Obaseki, Keith Robinson, and Angel Venzen had participated in the strike and requested reinstatement; and that the Respondent did not permanently replace the striking employees, but had hired only temporary employee replacements instead.

Subsequent to the closing of the CA cases, the General Counsel, Local 32B-32J, and the Respondent filed briefs. Attached to the Respondent’s brief was an “Appendix” which included various documents, which, while being admitted into evidence as part of the record in Case 29–CC–1285, was not received in evidence as part of the record in the CA cases. Counsel for the General Counsel, by motion dated January 26, 2000, moved to “Strike the Appendix to and Part of Respondent’s Post-Hearing Brief.” The Respondent submitted its opposition to General Counsel’s motion to strike on January 28, 2000. I denied the General Counsel’s motion to strike the appendix to and part of the Respondent’s post hearing brief.<sup>3</sup>

Additionally, by Order dated January 13, 2000, I granted the General Counsel’s motion to reopen the record in the above-captioned CA cases to receive the Respondent’s answer filed in a subsequent case involving the same parties, in Case 29–CA–23012, into evidence as Administrative Law Judge’s Exhibit 4 as part of the official record herein. In its answer to the complaint in Case 29–CA–23012, the Respondent admitted that

Eunice Johnson, property manager “has been a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent,” but denied that Johnson is “an agent for all purposes.”

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New York corporation, is engaged in the operation of a 23-story, 326-unit residential cooperative apartment building located at 333 Lafayette Avenue, Brooklyn, New York, its principal office and place of business. During the past year, the Respondent, in the course and conduct of its business operations derived gross revenues in excess of \$500,000, and purchased and received at its Brooklyn facility, goods, supplies, and materials valued in excess of \$5000 directly from points located outside the State of New York. The consolidated complaint in the above-captioned cases allege, the Respondent therein admits and I find that Pratt Towers, Inc. is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE LABOR ORGANIZATIONS INVOLVED

The consolidated complaint alleges, the parties admit, and I find that at all material times, Local 32B-32J has been a labor organization within the meaning of Section 2(5) of the Act. The record evidence also indicates that Local 2, at all times material herein, has been a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. The Evidence

###### 1. Background

Pratt Towers, Inc. owns and operates a small (326 units, 23 floors) low-income, city-subsidized housing development located at 333 Lafayette Street in Brooklyn, New York. It is a Mitchell-Lama cooperative, a city-aided limited profit housing company regulated by the city of New York Department of Housing Preservation and Development. The cooperative is bordered on one side by Lafayette Avenue and on the other by DeKalb Avenue. The cooperatives’ bylaws state its object to be, “to operate adequate, safe and sanitary housing accommodations for persons of low and middle income, in accordance with cooperative principles.” Senior citizens make up approximately 60–65 percent of its residents while young children approximately 20 percent. Pratt Towers is governed by a nine-member board of directors all of who are cooperators.

Pursuant to its bylaws the Respondent’s board of directors has “entire charge of the property, interests, business and transactions of the corporation, and may adopt such rules and regulations for the . . . management of the corporation as it may deem proper.” At all material times, Valerie Brooks has served as the president of the Respondent’s board of directors and the Respondent’s chief executive officer. John Porter has been

<sup>3</sup> The appendix to the Respondent’s post-hearing brief includes the following documents: a position statement for the Respondent’s counsel for Region 29 dated April 19; three position statements dated April 23; position statements, dated May 6 and 10; a June 4, 1999 letter from the Respondent’s counsel to the Deputy General Counsel appealing the Regional Director’s dismissal of certain portions of its charge; and a July 8 letter from the Board’s Office of Appeals denying the Respondent’s appeal of the Regional Director’s dismissal of portions of the Respondent’s charge. A party is not precluded from raising the substance of a dismissed charge as a defense to an unfair labor practice complaint. *Martel Construction*, 302 NLRB 522 (1991), citing *Warwick Caterers*, 269 NLRB 482 (1984). Nor is a party precluded from having the defense considered by an administrative law judge during a hearing. *Id.* That the Regional Director already investigated the substance of a defense has no bearing on a party’s due process privilege. *See, e.g., Chicago Tribune Co.*, 304 NLRB 259, 260 (1991); *Warwick Caterers*, *supra* at 483. However, in sustaining its burden of proof on affirmative defenses the Respondent must do so by the presentation of evidence at the trial whether by sworn testimony or documentary in nature. Since the Respondent’s “Appendix” contains documents never entered into evidence I consider them as nothing more than “legal argument” which the Respondent raises in support of its position regarding its affirmative defenses and certainly not to be considered as evidence since not part of the CA cases record. However, I am aware of cases in which attachments not in evidence have been stricken from briefs. *See AAA Fire Sprinkler, Inc.*, 322 NLRB 69 fn. 1 (1996); *Postal Service*, 310 NLRB 391 fn. 1 (1993); *EDP Medical Computer Systems*, 284 NLRB 1286, 1287 (1987); and *Washington Hospital Center*, 270 NLRB 396 fn. 1 (1984).

vice president of the Respondent's board of directors and since January 1999, Faythe Gaskin had held the position of assistant secretary and previously as the board of directors' secretary. Eunice Johnson, employed by Century Management, the current building's managing agent, has been the Respondent's property and site manager for approximately 3 years.

## 2. Supervisory and agency status

The consolidated complaint alleges that Eunice Johnson, Valerie Brooks, Faythe Gaskin, and Joan Newsome-White have been agents of the Respondent, acting on its behalf, or supervisors of the Respondent within the meaning of Section 2(11) of the Act. The Respondent denies that Johnson and Brooks are agents of the Respondent for purposes of the unfair labor practices litigated herein, and that board members Gaskin and Newsome-White are agents of the Respondent for any purpose.

Section 2(11) of the Act provides:

The term "supervisor means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, responsibility to direct them, or to adjust their grievances, or effectively to recommend such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with "genuine management prerogatives" should be considered supervisors and not "straw bosses, leadmen, set-up men and other minor supervisory employees." S. Rep. No. 105, 80th Cong. 1st Sess. 4 (1947).

The status of supervisor under the Act is determined by an individuals' duties, not by his or her title or job classification. *New Fern Restorium Co.*, 175 NLRB 142 (1969); *Longshoremen ILA v. Davis*, 476 U.S. 380, 396 fn. 13. (1986). It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act. *Advanced Mining Group*, 260 NLRB 486 (1982); *Magnolia Manor Nursing Home*, 260 NLRB 377 (1982). To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer statutory status. *Cypress Lawn Cemetery*, 300 NLRB 609 (1990); *Superior Bakery*, 294 NLRB 256 (1989), enfd. 893 F.2d 493 (2d. Cir. 1990); *NLRB v. Bergen Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982).

However, consistent with the statutory language and legislative intent, it is well recognized that 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *HS Lordships*, 274 NLRB 1167 (1985); *NLRB v. Wilson-Crissman Cadillac*, 659 F.2d 728 (6th Cir. 1981). Indeed as the court stated in *Beverly Enterprises v. NLRB*, 661 F.2d 1095 (6th Cir. 1981), "Regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of

authority becomes that of a supervisor." Thus the exercise of some supervisory authority "in a merely routine, clerical, perfunctory or sporadic manner does not elevate an employee into the supervisory ranks," the test must be the significance of his judgment and directions. *NLRB v. Wilson-Crissman Cadillac*, supra; *Lakeview Health Center*, 308 NLRB 75 (1992); *Hydro Conduit Corp.*, 254 NLRB 433 (1991). Consequently an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. *NLRB v. Wilson-Crissman Cadillac*, supra.

Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees. *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968). Additionally, the existence of independent judgment alone will not suffice for, "the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act." *Advance Mining Group*, supra; *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331 (1st Cir. 1948). In short, "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former." *Advance Mining Group*, supra; *NLRB v. Security Guard Service*, 384 F.2d 1 (5th Cir. 1967). Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective.

The burden of proving that an employee is a "supervisor" within the meaning of the Act, rests on the party alleging that such status exists. *Pine Brook Care Center*, 322 NLRB 740 (1996); *Ohio Masonic Home*, 295 NLRB 390 (1989); *RAHCO, Inc.*, 255 NLRB 235 (1983); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979).<sup>4</sup> Where the possession of any one of the aforementioned powers is not conclusively established, or "in borderline cases" the Board looks to well-established secondary indicia, including the individuals' job title or designation as a supervisor, attendance at supervisory meetings, job responsibilities, authority to grant time off, etc., whether the individual possesses a status separate and apart from that of rank-and-file employees. *NLRB v. Chicago Metallic Corp.*, 794 F.2d 531 (9th Cir. 1986); *Monarch Federal Savings & Loan*, 237 NLRB 844 (1978); *Flex-Van Corp.*, 288 NLRB 956 (1977). However, when there is no evidence that an individual possesses any one of the several primary indicia for statutory supervisory status enumerated in Section 2(11) of the Act, the secondary indicia are insufficient by themselves to establish statutory supervisory status. *J. C. Brock Corp.*, 314 NLRB 157 (1994); *St. Alphonsus Hospital*, 251 NLRB 620 (1982). Additionally, whenever there is inconclusive or conflicting evidence on specific indicia of supervisory authority, the Board will find that supervisory status has not been established with respect to those criteria.

In *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994), the Supreme Court set forth the test for determining whether an individual is to be deemed a supervisor. The Court

<sup>4</sup> However, in *NLRB v. Health Care & Retirement Corp of America*, 987 F.2d 1256 (6th Cir. 1991), the Sixth Circuit held that the General Counsel has the burden of establishing supervisory status.

noted that in making a determination on the question of one's supervisory status:

[T]he statute requires the resolution of three questions and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in one of the 12 listed activities [in Section 2(11)]? Second, does the exercise of that authority require "the use of independent judgment"? Third, does the employee hold authority "in the interest of the employer"?

511 U.S. at 573–574.

### 3. The status of Eunice Johnson

Based upon the totality of the evidence it is clear that Property Manager Eunice Johnson is a supervisor within the meaning of Section 2(11) of the Act and I so find. Johnson manages the day-to-day operation of the Respondent's facility needing no approval from the Respondent's board of directors in this connection.<sup>5</sup> Johnson also exercises significant authority with respect to the Respondent's maintenance employees regarding their terms and conditions of employment.

Johnson supervises the day-to-day activities of the maintenance staff, directs them in their work, answers any questions they may have involving their employment, and she resolves their grievances. Johnson testified that the maintenance employees know that she is the boss ranking above the building superintendent with authority to overrule any decision made by him. Johnson admitted that she has the authority to grant overtime and time off and has exercised this authority without the need to obtain prior approval from the Respondent's board of directors. Moreover, the record establishes that Johnson has, and exercises the authority to hire employees.<sup>6</sup> Johnson also has the authority effectively to recommend employee promotions,<sup>7</sup> and has and exercises the authority to discipline the maintenance staff without prior approval of the Respondent's board of directors.<sup>8</sup> Johnson also has the authority to recommend effectively an employee's termination to the Respondent's board.

<sup>5</sup> However, Brooks testified that as president of the Respondent's board she "manages" managing agent Johnson who speaks to her daily about matters involving the building and the maintenance staff.

<sup>6</sup> When called as a witness by the General Counsel, Johnson admitted that she has hired employees. Her authority to hire employees was corroborated by the Respondent's own witnesses, including CEO Valerie Brooks, and temporary employees Anibal Soriano and Daryl Thomas-Bennett who testified that Johnson had hired them. However, when subsequently testifying as a witness for the Respondent, she now denied having the authority to hire or even recommend the hire of employees, or that she had ever done so. To add to her inexplicable and contradictory testimony, Johnson later changed her testimony again, and admitted that she had made the decision to and hired all temporary replacement maintenance employees.

<sup>7</sup> Johnson effectively recommended the promotion of maintenance employees Angel Venzen to acting superintendent and Curtis Bailey to assistant superintendent.

<sup>8</sup> Johnson testified that she determines the type of discipline to issue, whether verbal or written which she imposes.

I also find that the record contains ample evidence that Eunice Johnson is an agent of the Respondent acting on its behalf.

Section 2(13) of the Act provides:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Legislative history dictates that the Board is to apply common law principles of agency in determining who is an agent under the Act. See *Longshoremen ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1993), remanded 56 F.3d 205 (D.C. Cir. 1995). In *Longshoremen ILA (Coastal Stevedoring Co.)*, supra, the Board noted that "when applied to labor relations, however, agency principles must be broadly construed in light of the legislative policies embedded in the Act." Moreover, in *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996), the Board held that the "common law principles of agency incorporate principles of implied and apparent authority." See *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988), in which the Board noted:

Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, Agency Section 27 (1958, Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Id.* at Section 8.

See also *Great American Products*, 312 NLRB 962, 963 (1992); *Dentech Corp.*, 294 NLRB 925 (1989).

As stated in a more subjective manner, "an employer can be responsible for the conduct of an employee, as an agent, where under all the circumstances the employees would reasonably believe that the employee was reflecting company policy and acting on behalf of management." *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993); *Shen Automotive Dealership Group*, supra. The Board has also held that the burden of proof is on the party asserting that an agency relationship exists. *Shen Automotive Dealership Group*, supra.

In addition to supervising the maintenance staff, Johnson also represents the Respondent regarding labor relations matters. Johnson testified, and it is undisputed, that she is on the Respondent's negotiating team and represented the Respondent throughout collective-bargaining negotiations with the Union. Johnson also testified that as part of her duties, she worked with the Respondent's counsel, McGill, in conveying important

information from him to the board of directors.<sup>9</sup> Moreover, Johnson's duties and responsibilities include contacting and retaining contractors for building repairs and vendors for supplies. Similarly, Johnson also represents the Respondent by soliciting and reviewing bids from contractors.

Thus, from Eunice Johnson's real and perceived significant authority over the Respondent's maintenance employees (strikers), including all of the above, the Respondent can be held responsible for her conduct, as its agent, "where under the all the circumstances the employees would reasonably believe that the individual [Johnson] was reflecting company policy and acting on behalf of management." *Shen Automatic Dealership Group*, supra; *Kosher Plaza Supermarket*, supra.<sup>10</sup>

#### 4. The status of Valerie Brooks

In her capacity as president of the board of directors and chief executive officer, Brooks is involved in the day-to-day operations and functioning of the building. Brooks testified that she "manages" the managing agent (Johnson) conferring with Johnson on matters dealing with the maintenance staff and the operation of the building. Brooks, as a board member, participates in reviewing Johnson's recommendations for the hire of job applicants, promotion of employees, discharge of employees, etc. In addition, according to Brooks' own testimony, she directs the work of the maintenance staff by informing Johnson of any problems to correct or work to be performed by the maintenance employees. Brooks also represents the Respondent in labor relations matters,<sup>11</sup> and corporate matters.<sup>12</sup>

Under Board law, the test for agency is whether, under all the circumstances, an employee would reasonably believe that the alleged agent was speaking for management and reflecting company policy. *Lovilia Coal Co.*, 275 NLRB 1358, 1372 (1985). Further, elected or appointed officials of an organization are presumed to be agents of that organization clothed with

apparent authority. *Nemacolin County Club*, 291 NLRB 456, 458 (1988), enfd. 879 F.2d 858 (3d Cir. 1989).

Under all the circumstances, particularly her position as president of the board of directors, I find that employees could reasonably conclude that Valerie Brooks reflected the views of the Respondent, and that she is an agent under the Act. *House Calls, Inc.*, 304 NLRB 311 (1991). Also see *Barrow Utilities & Electric*, 308 NLRB 4, 13 fn. 8 (1992).

#### 5. The status of Joan Newsome-White

At the time of the trial, Joan Newsome-White had been a member of the board of directors for approximately 1 year. As a board member she votes on matters affecting the building, including decisions regarding building repairs and contracts with outside contractors. As a board member Newsome-White also votes on personnel matters, such as hiring and firing of employees, hiring the managing agent, employee matters, etc.

Newsome-White testified that she attended the March 11, 1999 meeting at Johnson's request, because she was a board member, during which several striking employees made unconditional offers to return to work. Moreover, as a board member Newsome-White voted on whether to accept the Respondent's counsel's March 25, 1999 draft letter denying the striker's reinstatement.

The evidence demonstrates that Joan Newsome-White as a board member has authority to act on behalf of the Respondent. In addition elected or appointed officials, such as officers or members of the board of directors, are presumed to be agents and are clothed with apparent authority. *House Calls, Inc.*, supra; *Nemacolin Country Club*, supra. I therefore find that Newsome-White is an agent of the Respondent acting on its behalf.

#### 6. The status of Faythe Gaskin

Faythe Gaskin has functioned as secretary to the board of directors for 13 years and currently is the assistant secretary to the board since January 1998. As a member of the board she votes on matters pertaining to the operation of the premises including contracting out work to vendors, maintenance and repairs to be performed, and employee matters. While at first denying that board members voted on the hiring and firing of staff she then contradicted her own testimony, admitting that board members do vote on Johnson's recommendations on these issues regarding the maintenance staff.

From the evidence herein and Board law, I find Faythe Gaskin to be an agent of the Respondent acting on its behalf. *House Calls, Inc.*, supra; *Nemacolin Country Club*, supra.

#### 7. The maintenance staff

At all material times, the Respondent employed a building staff of six maintenance employees, Curtis Bailey, Theorgy (Theo) Brailsford, Lawrence (George) Folkes, Keith Robinson, Jude Abaseki, and Angel Venzen. The record establishes that the Respondent's maintenance employees were long tenured; Folkes (27 years); Obaseki (14 years); Brailsford (12 years); Robinson (since 1994); Venzen (since 1993); and Bailey (at least 3 years). It is undisputed that the Respondent considered the maintenance staff to be excellent employees. Eunice Johnson testified that she often complimented the maintenance men

<sup>9</sup> Johnson additionally represents the Respondent by working with its attorneys regarding corporate and landlord/tenant matters and worked with McGill in interviewing and preparing employee witnesses for testifying during this trial.

<sup>10</sup> The Respondent argues that Johnson did not have the authority, real or apparent, to preempt the board of directors and offer the strikers reinstatement, conditionally or otherwise. But the test for agency is whether, under all the circumstances, an employee could reasonably believe that the alleged agent was reflecting company policy and speaking for management. *American Lumber Sales*, 229 NLRB 414, 420 (1977). There is no doubt in my mind that the strikers unquestionably believed that when Johnson requested that they obtain a letter from the Union before they could be reinstated, she was speaking for the Respondent as its agent, and that this was a prerequisite to returning to their jobs. Moreover, as Sec. 2(13) of the Act provides, "the question of whether specific acts performed were actually authorized or subsequently ratified shall not be controlling."

<sup>11</sup> Brooks represented the Respondent during the course of the April 1998 union representation election, signed the voting eligibility list, designated the Respondent's observer for the election and signed the tally of ballots. Brooks admitted that she needed no special authority or resolution by the board of directors to sign these documents.

<sup>12</sup> Brooks testified that as chief executive officer, any corporate matters were "under her venue." She signs contracts with vendors on behalf of the Respondent and is one of two signatories of checks on the Respondent's behalf.

on how clean they kept the trash compacting room, that the Respondent trusted them and had a good working relationship with each of the employees, and that the maintenance employees were a "nice group." In fact, several employees, including Obaseki, Brailsford, and Bailey, often did favors for Johnson and for the building that were not a part of their regular porter duties.

Additionally, the Respondent rewarded several of the maintenance employees with promotions as good employees: Angel Venzen to handyman, then in 1997 to assistant superintendent, and when the superintendent was injured in January 1999 to acting superintendent; Curtis Bailey from porter to acting handyman also in January 1999.

#### 8. Union representation

Prior to April 1998, the Respondent's building service employees were represented by Local 2, New York State Independent Union of Building Service Employees & Factory Workers (Local 2). Pursuant to a stipulated election agreement an election by secret ballot was held on April 7, 1998 with both Local 2 and Local 32B-32J on the ballot. A majority of the ballots being cast in favor of Local 32B-32J, on April 21, 1998, the Union was certified as the exclusive collective-bargaining representative of all full-time and regular part-time building service employees employed by the Respondent at 333 Lafayette Avenue, Brooklyn, New York, excluding guards and supervisors as defined in the Act.

#### 9. Board of directors' meeting on April 27, 1998

On April 27, 1998, soon after the Board election, the Respondent held a closed meeting of its board of directors. The agenda for discussion included Local 32B-32J. Present at this meeting, among others, were Valerie Brooks and Eunice Johnson. Minutes of this meeting establish that the Respondent considered the election of Local 32B-32J as its maintenance employees' bargaining representative to be "a very bad situation." Evidence in the record establishes that the Respondent felt that the wage and benefit proposal by the Union would "simply be too extravagant."<sup>13</sup> At this meeting Kevin Donohue of Elm Management, the Respondent's managing agent at the time for whom Eunice Johnson the Respondent's site manager worked, commented on his knowledge of the process of a property's contract negotiations and transition from one union to another. Donohue told the board of directors:

When the employees elect to join another union, a whole year must pass before another election can be held. Most properties that either have no union or have Local 2 or 670, find it difficult to move to Local 32B-32J because the welfare contributions and salaries are much more. There is a possibility whereby the [b]oard could investigate offering the staff another union. You can do this, but they cannot decertify from

this union until a year has passed. You can also drag out the negotiations for a period of time. If this is done, during this time, there is a possibility that the employees—will not have any medical coverage or there may be a strike. The problem with that is there is no guarantee that the employees will decertify from 32B-32J and choose another union. The best case scenario of a very bad situation is to negotiate with the union.

Donohue also recommended that the Respondent "get a labor attorney . . . it is money well spent. Again, the only option that the [b]oard has is to slow up the phase-in."

#### 10. The Board of directors' meeting of August 11, 1998

The minutes of this meeting, attended by Eunice Johnson, states:

The maintenance staff elected to leave Local 2 and go with 32B-32J Union . . . . It was noted that without a contract, the maintenance staff of 8 men is working without medical coverage . . . . Mr. Gaggen<sup>14</sup> suggested keeping them out of the union altogether. Give the men a good salary and good health benefits and you will never have to deal with the Union again. It would be to the [b]oard's benefit not to have a union. Since their union is dragging their feet, the [b]oard might consider approaching the maintenance men with this proposal. Ms. Brooks did mention that legally we are bound to 32B-32J for at least one year, since the men did vote, Mr. Gaggen indicated that he would speak to Mr. Zabinsky regarding a non-union.

Subsequently, on August 12, 1998, board member John Porter met with the maintenance staff during which "a lot of issues" were discussed. Porter was to meet with the employees again later in order to "nip in the bud" any problems they might have.

#### 11. The Board of directors' meeting on October 27, 1998

The minutes of this meeting discloses:

Mr. Porter mentioned several options that can be offered the staff. He plans to meet with the staff on November 10, 1998 and let them know where they stand and what their options are . . . . In the meantime, Ms. Brooks felt that a strike contingency plan should be worked on just in case the staff chooses to go with the union and there is a strike.

Brooks testified that Porter had said that he intended to speak to the employees, to tell them what their different options were about getting a different union than Local 32B-32J.<sup>15</sup>

Moreover, in a building status report dated December 8, 1998, from Johnson to the board of directors, she states under the heading of "Collective Bargaining" that the Respondent's

<sup>13</sup> Brooks at first testified that both she and the board of directors thought that the Union's proposed contract was "not too expensive" but more expensive than Local 2's contract. Brooks then appeared to agree that the Union's demands were "far too high . . . and completely unacceptable" and were "too extravagant." In a June 8, 1999, memo to shareholders, the Respondent reported that the Union's demands were "far too high" and completely unacceptable.

<sup>14</sup> Gaggen, having replaced Donohue, along with Eunice Johnson, were employed by Elm Management, the Respondent's managing agent at that time.

<sup>15</sup> However, Eunice Johnson testified, "In this, it is not speaking of their options as far as the union is concerned . . . we didn't want to be accused of trying to give the men options for the other union. This never happened. We discussed it, yes." Johnson's testimony was contradicted by John Porter's testimony herein who acknowledged that "options" meant other unions.

labor counsel, Kevin McGill, having received no response to his October 28, 1998 letter to the Union, suggested that the Respondent, "Indirectly propose to the staff the possibility of going to another Union, such as Local 670. This union will actually negotiate with the client . . . . Keep in mind Pratt Towers is committed to Local 32B-32J for a period of one year from the date of Certification."

#### 12. The contract negotiations

By letter dated April 28, 1998, the Union notified the Respondent that on April 21, 1998, it had been certified by the National Labor Relations Board as the bargaining representative of the Respondent's building service employees and requested dates for the commencement of negotiations.

The Respondent and the Union met on four separate occasions: August 26, September 24, October 27, 1998, and on January 7, 1999, to negotiate a collective-bargaining agreement. Ira Sturm, Esq., counsel for the Union,<sup>16</sup> and an experienced labor attorney, was its chief negotiator and sole participant for the Union. The Respondent's principal spokesperson at the negotiations was its labor counsel, Kevin McGill, Esq.<sup>17</sup> None of the unit employees attended or played any role in these negotiations.

#### 13. The August 1998 bargaining session

The first negotiation meeting between the parties was held on August 26, 1998. Present were Kevin McGill, Eunice Johnson, and board of directors' president, Valerie Brooks, for the Respondent, and Ira Sturm for the Union. This being in the nature of an introductory session, the parties set forth some of their positions in generalities but did not engage in any substantive bargaining or make any formal proposals. McGill briefly described Pratt Towers as a residential apartment building of low and middle income rentals subject to New York City's Mitchell Lama program. At McGill's request Sturm now explained to the Respondent's representatives the Real Estate Advisory Board's contract with Local 32B-32J (the RAB contract), as well as the Union's form independent apartment house agreement of 1997 (the independent agreement). Sturm further explained that the Real Estate Advisory Board is a multi-employer association which negotiates a master pattern agreement containing wages and terms and conditions of employment on behalf of its members and does not permit any change in the terms of the agreement. Sturm then explained that the independent agreement drafted by Local 32B-32J, was similar to the RAB contract except in certain areas like the expiration language in the "evergreen" clause and the "reduction-in-force" provision. There was some discussion about the disparity between the wage rates in the RAB contract and the employees' present wage rate.

Sturm testified that as an "offer in lieu of negotiation" Local 32B-32J gave Pratt Towers the option of entering into either the RAB contract, or the independent agreement. Although Sturm testified that he gave the Respondent a third option, "to bargain

an agreement from scratch" as was his standard procedure when negotiating contracts, both McGill and Johnson testified that Sturm never gave the Respondent such an option.<sup>18</sup> McGill testified that inasmuch as Pratt Towers could not afford the RAB contract, the Employer's only realistic option was to choose the independent agreement as the starting point for negotiations.

McGill protested that the entire independent agreement created a financial hardship for Pratt Towers. Sturm proposed that Pratt Towers could have the option to negotiate wages or take the wage increase in the independent agreement plus a \$10 catch-up until wages reached the industry rate. Medical costs was an Employer concern since Local 32B-32J's health plan costs were 60 to 70 percent higher than the cost of its employ-

<sup>18</sup> McGill also testified that Pratt Towers, in fact, was never given the option to bargain from scratch at any time during the entire negotiation period. While McGill took no notes of this first meeting, Sturm did. The record shows that nowhere in Sturm's notes which he made contemporaneously during the negotiations, including the August meeting, is there any reference to the phrase "bargain from scratch" as an option given to the Respondent during the negotiations between the parties. Moreover, while the Union's business agent Daniel Gross testified that he exhibited copies of both the RAB and the independent agreement to Pratt Tower's employees to show them what Local 32B-32J was offering the Employer for them, he never testified that he told them that the Union had also offered Pratt Towers the option to bargain from scratch, or any words to this effect. Additionally, noting McGill's constant protest, throughout the negotiations, about what he referred to as "outrageous" clauses in the independent agreement (i.e.: the evergreen clause, contract arbitrator clause, reduction-in-force clause, medical insurance fund costs, etc.), it would seem improbable that Pratt Towers would not consider to negotiate from scratch rather than the independent agreement, which McGill also felt created a financial hardship for Pratt Towers, if such a choice had been offered by Sturm. As to McGill's failure to take notes during the August 1998 meeting, the record shows that he did take notes at all the other negotiation sessions. McGill also testified that immediately after a bargaining session he supplemented his notes with more detail. In addition, after each bargaining session, McGill prepared a letter, which he sent to the Union, summarizing what he thought the parties had discussed. Moreover, McGill failed to offer any explanation for not following his ordinarily thorough note-taking practice. General Counsel in her brief "submits that an inference that there are such bargaining notes, and that they would not have supported Respondent's position." Johnson testified that she had taken notes of the discussion at this meeting but could not find them.

This issue presents a close credibility question.

However, it should be noted that while I may disbelieve Sturm regarding this part of his testimony, I do not discredit all of his testimony, given in the CA cases since I did find him to be generally a truthful and therefore believable and credible witness. A trier of fact is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says. *Americare Pine Lodge Nursing*, 325 NLRB 98 (1997); *Brinkman Southeast*, 261 NLRB 204 (1982); *Giovanni's*, 259 NLRB 233 (1981); *Maxwell's Plum*, 256 NLRB 211 (1981). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950):

It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.

Moreover, the above would also be applicable to the testimony of McGill and Johnson as will be discussed in other parts of this decision.

<sup>16</sup> Sturm has represented the Union for almost 20 years.

<sup>17</sup> McGill is also an experienced labor attorney with approximately 20 years negotiating contracts with the Union. Eunice Johnson also attended all the negotiation sessions.

ees previous coverage under Local 2's plan. The parties were also concerned that the employees had no medical coverage at present, and this was also a topic of discussion. McGill suggested using the American Arbitration Association (AAA), since the independent agreement specifically provides for arbitration via the Office of the Contract Arbitrator (OCA), and the Respondent and the RAB have exclusive authority jointly to select the arbitrators thus effectively negating Pratt Towers input in the choice of an arbitrator under its own collective-bargaining contract. The Union rejected McGill's proposal.<sup>19</sup> Additionally, both McGill and Sturm indicated their unhappiness with some of the arbitrators listed in both the form RAB and independent agreement.

The Respondent also expressed "great concern" over the reduction-in-force provision of the independent agreement (RIF). Under this clause the Employer was required to obtain written permission from the Union's president before it could reduce its staff size. Pratt Towers wanted the flexibility to determine its staff needs and suggested that if staff were reduced from 8 to 6 employees, Pratt Towers might be able to afford the contract. The parties adjourned with the agreement to "consider the situation."

#### 14. The September 24, 1998 meeting

The second negotiation session took place on September 24, 1998. Attending this meeting were Kevin McGill, Eunice Johnson, and board of director vice president, John Porter, for the Respondent, and Ira Sturm representing the Union. The parties discussed the economics of the contract. McGill again expressed great concern about the cost of the Local 32B-32J's medical plan as provided for in the independent agreement and proposed to offset this by "attriting" one position and no wage increase for the term of the agreement or payment into the pension and other Union funds. The Union rejected the Respondents proposal.

Sturm proposed that the wage increase go into effect on April 21, 1999 (the annual date of the independent agreement), with a \$10 catch-up and that the Respondent start payments into the union funds in November 1998. The Respondent rejected this as too expensive. Moreover, the parties discussed the reduction-in-force issue with the Respondent wanting to fix its own staffing needs. The Union finally took the position that the unit, remain at eight not six employees. Sturm testified that the Respondent made no counterproposal regarding wages at

this meeting. The parties also discussed the arbitration clause. The Employer proposed to select two arbitrators, Bernard Young and Howard Edelman, from among the list of arbitrators in the independent agreement. The Union did not respond to this proposal at that time.

Sturm testified that as of the conclusion of the second negotiation session, the Union had proposed several variations from the independent agreement, including the effective date of the contract, when wage increases would go into effect, the amount of the wage increases, the question of unit size and reduction-in-force language, the effective date of fund coverage and eliminating "security guards" from the contract. Sturm also testified that issues that had been put on the table for discussion were considered open issues as far as the Union was concerned, and to the extent that no issues were raised regarding other language in the independent agreement, there were no issues.

Johnson's notes of the September 24 bargaining session indicate that at the conclusion of this meeting, Kevin McGill suggested that the Respondent meet with the maintenance employees to find out what they were looking for under the agreement. John Porter corroborated that this occurred. Porter testified that he and Johnson met with the maintenance employees in early October 1998.<sup>20</sup> At first Porter was "positive" that "Nothing" was said at all by anyone at this meeting concerning the Union, however, he later testified that at one meeting he had discussed with employees the issues raised at the negotiations. However Theorgy Brailsford testified that in October or November 1998, Porter and Johnson met with the maintenance staff and asked the employees what they wanted from the Union and asked whether the Union had kept them informed about the negotiations.

#### 15. Pratt Towers' October 8, 1998 letter

By letter dated October 8, 1998, from McGill to Sturm, Pratt Towers set forth its proposal for a collective-bargaining agreement indicating that the parties should "work from the standard 1997 apartment house agreement." This letter continues:

There are numerous provisions in this agreement we would like to negotiate out, but we recognize that if we were to take a hard and fast position with so many of these items that we will not conclude an agreement anytime in 1998. Having said that, we are unable to agree on the following provisions of the apartment house agreement:

1. The wage scale.
2. The health plan contributions.
3. The annuity plan contributions.
4. The pension plan contributions.
5. The Office of the Contract Arbitrator.
6. The no reduction in force clause.
7. The "roll-over" or "evergreen" clause which appears to be camouflaged within the sale and transfer clause.

<sup>19</sup> One of the Respondent's defenses to the allegation that it unlawfully conditioned reinstatement upon the employees abandoning the Union, the Respondent, at trial took the position that the arbitration clause in the independent agreement is a nonmandatory subject of bargaining, and that it constitutes a violation of Sec. 8(b)(1)(B) of the Act to require an employer to agree to an arbitrator not of its choosing. McGill stated that therefore the independent agreement was illegal and a reason why the Respondent refused to reinstate the strikers. It is undisputed, and the Respondent does not deny, that it did not raise this argument during the course of the negotiations. Additionally, since the record indicates that the Union made several proposals to accommodate all of the Respondent's concerns regarding arbitration, which the Respondent rejected and failed to offer a counterproposal, there is a lack of evidence to support the Respondent's contention that the Union insisted on the arbitration clause as a condition of reaching a contract.

<sup>20</sup> Porter testified that the Respondent had arranged to have regular monthly meetings with the men. However the evidence shows that the only meetings with staff occurred in August and October 1998, and perhaps one in 1997.

8. The union security clause may not be legal. We have no objection to a legally sufficient Union security clause.

9. The inclusion of security guards in the unit description.

*Wages*—We are prepared to offer the following:

an increase in base weekly wages of \$20.00 for each classification and for each of the three years of the contract. This is basically the \$15.00 increase recently negotiated in 1997 plus a \$5.00 per week “catch-up.”

*Health and Welfare Benefits*—We are prepared to offer an annual contribution of \$3,500 which is the amount we had been contributing to the Local 2 Welfare Fund. This annual contribution would be for each of the three years of the agreement.

*Annuity Fund*—We have no proposal for any contributions to the annuity fund.

*Pension Fund*—We offer an annual contribution of \$338.04 @ 28.17 per month).

*Contract Arbitrator*—We propose Howard Edelman and Elliot Shriftman to serve on a Rotating basis.

*Reduction in Force*—Our proposal is for the deletion of all language restricting the Employer’s right to reduce staff, if necessary.

*Term of the Contract*—The contract term we propose is three years from the execution date of the contract. We do not agree that the contract will remain in full force and effect notwithstanding the expiration date, as appears to be the case in the evergreen clause contained in your scale and transfer provisions.

*Security Guards—delete*

The above-described proposal is an attempt to harmonize our financial situation with the expectations of our employees that they will be covered by a relatively standard industry agreement. *The financial burdens contained in the 1997 apartment house agreement are not something that we can accept in toto.* Nonetheless, we have attempted to give our employees the numerous protections and prerogatives contained in the Independent agreement. Naturally, we are willing to discuss this with the Union and to answer any of your questions or hopefully respond to any of your concerns.

Therefore, by this October 8 letter, Pratt Towers informed the Union that while it did not like all of the provisions in the independent agreement, it was amenable to accepting all of the terms of this agreement except for those major disputed items listed above in McGill’s October 8 letter. Moreover, the record demonstrates and the Respondent admitted that what McGill set forth in his October 8, 1998 letter to the Union constituted the Employer’s offer to Local 32B-32J. As McGill and Johnson both testified, Pratt Towers’ proposal to the Union was the independent agreement with the exception of the nine enumerated items listed above.<sup>21</sup>

<sup>21</sup> While McGill admitted on numerous occasions that the Respondent proposed and agreed to all provisions of the independent agree-

ment McGill admitted that he did not read the independent agreement for the purpose of identifying any illegal or non-mandatory provisions until March 18 or 19, 1999. McGill stated that he always suspected the illegality or nonmandatory nature of certain clauses (contract arbitrator clause, evergreen clause), however he admitted that in spite of this, he never attempted to withdraw the Respondent’s previous consent to the form language in the contract on these provisions, nor did he tell the Union that the Respondent would no longer agree to them. It appears that the first the Union learned that the Respondent felt that the strike was illegal was in the Respondent’s March 24, 1999 letter to its employees denying them reinstatement.

#### 16. The October 27, 1998 meeting

The third negotiation session between the parties with their same respective representative occurred on October 27, 1998. McGill again raised the issue of the expense of the Union’s proposed medical plan as a major problem for the Respondent as to cost. McGill proposed that the Respondent be permitted to participate in the “Suburban Plan” a medical plan provided for in the Union’s contracts with Long Island and New Jersey employers that is less costly than the medical plan in the independent agreement. The Union rejected the Respondent’s proposal because it would raise too many problems.

Next, the Union proposed that the contract expiration coincide with the industry contracts. The Respondent proposed a 3-year contract, effective from the date of execution. The parties then discussed the evergreen clause. The Respondent stated that it would not agree to an evergreen clause, and that it wanted a 3-year contract effective on the date of execution and to expire on the anniversary at the end of the third year. According to McGill’s testimony, the Union said that it would not “change” or delete the evergreen clause from the contract.

Pursuant to McGill’s October 8, 1998 correspondence to Sturm, the Union agreed to use the standard apartment house agreement, with certain changes that the parties discussed. These changes included the Union wage proposal of \$15 and a \$10 catch-up, effective in November 1998, with standard increases after that, the effective date of benefits to be November 1, 1998, and exclusion of security guards from the unit. In addition, the parties agreed to eliminate the named arbitrators from the form agreement and substitute the name of Howard Edelman. Because the Respondent continued to complain about the cost of the union medical benefits, Sturm proposed an idea that could save the Respondent money and yet allow them their choice regarding the arbitrator. Sturm proposed that the Respondent have the choice of using the office of the contract arbitrator, or choosing Edelman to arbitrate crucial grievances. If the Respondent chose the office of the contract arbitrator,

ment except for the nine enumerated items in the October 8 letter, McGill contradicted this testimony by also testifying that the Respondent did not agree to any of the specific items in the independent agreement that were not discussed. I do not credit McGill’s contradictory testimony concerning this. While McGill’s October 8 letter speaks plainly to this issue, it also points up the fact that the Respondent’s primary concern during the negotiations was related to the economics of the contract.

each party would pay the usual \$200 fee. If the Respondent wanted to appear before Edelman, the Union would pay the \$200 fee, and the Respondent would pay the difference between the arbitrator's fee as an independent arbitrator and the OCA fee. The Respondent neither accepted nor rejected this proposal at the time.

The parties again discussed the issue of staffing. The Respondent wanted to reduce the staff from eight to seven employees in order to fund any increased costs for medical and pension funds. Concerned that the parties would be causing an employee to leave his job in order to get a contract, Sturm inquired again about the seniority of unit employees. He learned that the least senior person had 3 years with the Respondent. Sturm asked the Respondent whether, if the union agreed to a staffing level of seven, the parties had a contract. McGill said no, that the Respondent still wanted the elimination of the reduction-in-force language so that the Respondent had the freedom to determine staffing levels at any point. The parties then agreed to adjourn the meeting.<sup>22</sup> The Respondent admitted that from the beginning of negotiations through the end of the October 27 meeting, its proposals had remained unchanged.

McGill testified that after the October bargaining session, he told Johnson to tell the board of directors to propose to the employees that they seek another union.

#### 17. The January 7, 1999 bargaining session

The same party representatives met for the fourth, and last, bargaining session on January 7, 1999. Ira Sturm began the meeting by presenting a wage proposal of a \$15 increase on November 1, 1998, with contract increases and a \$10 catch-up beginning in April 1999 rather than on November 1. The Union proposed that the Respondent contribute to the funds effective November 1, 1998, Sturm's bargaining notes reflecting that the issue of fund contributions being a significant problem for the Respondent. The Union also agreed to provide a separate rider for the building superintendent. The Union rejected the Respondent's proposals to eliminate the evergreen clause, the 3-year fixed contract, the reduction-in-force language, the arbitrator proposal, and the Respondent's proposal to join the Union's Suburban medical plan. McGill offered that the Respondent could reluctantly live with the office of contract arbitrator if the Union were more flexible on the medical issues.

Thus, by the end of this meeting Sturm had proposed the independent agreement language with modifications: the effective date of the wage increase be moved to April 21, 1999, a wage catch-up period, a separate superintendent rider allowing the Respondent more flexibility, a different contract expiration date, and an effective date of January 1, 1999, for contributions to the pension and welfare funds. The Respondent rejected the

Union's proposals. The Respondent made no counterproposal to the Union's January proposal regarding wages, the annuity fund, and the contract arbitrator. Moreover, the Respondent never changed its proposal that it join the Union's Suburban medical plan and offered pension fund payments in the same amount as it had paid under the prior Local 2 contract.<sup>23</sup>

However, the parties remained adamant as to their respective positions, the Respondent regarding the items contained in its October 8, 1998 letter to the Union, and the Union as to those unresolved issues in the independent agreement vis-à-vis this letter. The parties failed to reach a final agreement, and both McGill and Sturm testified that after the January 7 bargaining session, they believed that the parties had reached an impasse in negotiations.<sup>24</sup>

McGill testified that he asked Sturm, what if anything, would occur if the Respondent did not accept the Union's proposed agreement and Sturm replied that the Union would have no alternative but to strike the building.

Moreover, according to McGill's testimony, Sturm now told him that he wanted the Respondent to sign the contract that evening. McGill advised Sturm that he was obliged to take back the Union's last offer to Pratt Towers' board of directors for its consideration. This was the first that Sturm had been made aware that the Respondent's representatives at the negotiations had no authority to agree to a contract. McGill testified that he believed Sturm responded to this comment, "Look, its on the table tonight and there's no guarantee that if you accept it after tonight that it will be there any more." McGill stated:

This was towards the end of the meeting and [Sturm] said, Look, the only thing that we can do for you is on the wage increases and the implementation dates, and if you're not prepared to accept that as is, we will have no other choice but to strike the building.<sup>25</sup>

McGill also testified that Sturm had reiterated that Pratt Towers had to take the independent agreement "as is" that evening more than once, but McGill also admitted that he knew that "as is" meant the independent agreement with changes that the parties had discussed. However, McGill never asked Sturm

<sup>23</sup> The record evidence clearly shows that the Respondent on October 8, 1998, proposed to the Union the independent agreement, with the nine modifications thereof, and thus in effect agreed to all the other terms in the independent agreement except for the nine items listed in its October 8 letter. McGill agreed that it was "essentially correct" that after October 8, 1998, there was no dispute raised as to any of the items or any of the terms contained in the independent agreement except for the nine items that were listed in the October 8 letter, although he also appeared to contradict this testimony elsewhere.

<sup>24</sup> The evidence illustrates that on January 7, 1999, the parties had reached impasse on wages, medical, and other benefit funds, contract arbitrator issue, reduction-in-force language, the evergreen clause, and the union security clause whose legality McGill questioned, while other clauses, such as the "picket line" clause, the "subcontracting" clause, were never discussed or challenged during the negotiations.

<sup>25</sup> McGill initially testified that Sturm wanted a "response" from the Respondent that night. He later testified that Sturm wanted the Respondent to sign the contract that evening, adding that Sturm demanded that the contract be accepted by the Respondent "as is" or the Union would have no other choice but to strike the building.

<sup>22</sup> McGill testified that Sturm had stated at this bargaining meeting that there were only two variables that the Union would permit from the independent agreement—retroactivity and wage increases. Sturm denied that he had made this statement that actually McGill had done so. However, Sturm's notes of this bargaining session states, "U only variables from U perspective is amount of increase and retroactivity," and McGill's notes of this meeting reflect, "Ira says, there are basically two variable—retroactivity—wage increase, amount of it" and that these were the "only variables."

what was meant by “as is.”<sup>26</sup> McGill asked Sturm if he could give Pratt Towers some notice before a strike would occur, but Sturm replied no, why should he do that? McGill told Sturm that he would try, and call him the following day and the meeting then ended.

Johnson testified that Sturm had said, “I would like to have [Pratt Towers] sign this agreement tonight.” She also testified that she recalled Sturm saying that Pratt Towers had to sign the agreement “as is.”<sup>27</sup> However, Johnson admitted that at the conclusion of the January 7 negotiation session the Union’s proposal included the independent agreement with changes concerning wages, medical plan, reduction-in-force and effective dates of the agreement. Johnson added that other than wages, benefits, the arbitrator and the length of the contract, the Respondent was aware of no other issues that might have caused the Union to go out on strike.

Sturm’s testimony directly contradicts that of the Respondent’s witnesses. Sturm testified that he didn’t think that he told the Respondent that the contract had to be signed that night, but instead had said, “[T]his is a deal that’s on the table tonight, you can either accept it or reject it, but if you turn it down I’m not guaranteeing that this deal will be on the table tomorrow . . . .” Sturm stated that he also may have said, “Well, the offer may not be available after tonight . . . and if you make another offer there’s no guarantee the Union will accept it.” Sturm denied that he told McGill at the January 7, 1999 negotiation session or at any other time that the Respondent had to sign the independent agreement “as is” with no changes.

Both the Respondent and the Union during negotiations had proposed changes in the independent agreement. It does not seem reasonable to suppose that the Union would demand the signing of the agreement “as is” without any changes. Even assuming arguendo the Union did require the Agreement to be signed “as is,” as admitted by the Respondent’s witnesses in their testimony, “as is,” was interpreted by them to mean the independent agreement with some changes and modifications as discussed by the parties.

It is undisputed and the Respondent admits, that on October 8, 1998, it proposed to the Union the independent apartment house agreement, with nine proposed modifications. Thus, despite McGills contradictory testimony as to this, the record establishes that the Respondent agreed to all terms in the independent agreement, except for the nine items set forth in the Respondent’s October 8 letter. Moreover, it is undisputed that the Respondent never raised any objection to article 3, man-

agement-rights clause of the independent agreement. It is undisputed that neither the Respondent nor the Union, raised the subject of picket lines and the picket line clause in the independent agreement during the entire course of the negotiations. Nor did the Respondent assert during the negotiations that the strikes or lockouts provision in the independent agreement was illegal or raise any objection to this proposal. The same is true of the subcontracting clause in the independent agreement. No discussion was had on these provisions. However, in its October 8, 1998 letter the Respondent did make reference to the “evergreen clause” but not as to its legality, and to the legality of the “union security clause.”<sup>28</sup>

McGill admitted that at no time prior to March 15, 1999, did the Respondent seek to withdraw from its agreement to any of the terms that had not been in dispute in the independent agreement and the first time he challenged any provision was when he filed an unfair labor practice charge against the Union. Thus, the Respondent appears never to have asked the Union to take any proposal off the bargaining table, other than what was discussed or provided in its October 8th letter.<sup>29</sup>

#### 18. The strike

On February 22, 1999, the Respondent’s maintenance employees went out on strike at the insistence of the Union. Sturm testified that it was not an object of the strike to obtain the picketing clause or subcontracting clause in the collective-bargaining agreement between the parties.<sup>30</sup> Sturm stated that the purpose of the strike was to achieve agreement on issues that were in dispute, such as the effective date of the contract, wage rates, and the date of implementation of any wage increases, whether the Respondent would contribute to the Union’s funds and when, the length of the contract, whether the contract would include the evergreen clause, the reduction-in-force language, whether the length of the contract would coincide with the independent agreement or be for 3 years, as the Respondent proposed, and whether the arbitrator would be

<sup>28</sup> Sturm testified that in McGill’s October 8 letter, McGill raised the question of whether the union-security clause was legal. Sturm testified that he pointed out to the Respondent during the negotiations that the second paragraph of that clause provides that in the event the clause is deemed unlawful for some reason, it would be interpreted only in a lawful manner. As Sturm’s un rebutted testimony establishes, this was the only time that the issue of the union-security clause arose during the entire course of negotiations. It is undisputed that the Respondent never proposed any language of its own to replace the union-security clause in the agreement.

<sup>29</sup> Sturm testified that some time after the fourth bargaining session on at least two occasions, he attempted to pursue contract negotiations with McGill. After the commencement of the strike, at a meeting with McGill on another matter, Sturm suggested the possibility of putting off all wage increases and fund contributions until April 1999 in order to allow the Respondent to save money. On or about February 26, 1999, Sturm made another proposal, which the Respondent also rejected without making any counteroffers.

<sup>30</sup> McGill admitted that had the parties reached agreement on the nine items listed in the Respondent’s October 8 letter, the bargaining agreement would have included the picketing and subcontracting clauses.

<sup>26</sup> In his notes of this bargaining session, McGill reflected, “Ira says we have to take the Ink as is or he will strike the building. Ask for notice, Ira says he will not give notice.”

<sup>27</sup> Johnson conceded that her recollection regarding what occurred at the negotiation sessions was unreliable because she was only there as an observer and was not paying that close attention. However, while Johnson did testify that she recalled Sturm using the words “as is” relating to the signing of an agreement, when asked by the judge subsequently in her testimony, if Sturm had said that the Respondent had to take the “contract” or “proposals,” “as is,” Johnson answered that she did not recall. Additionally, while Johnson testified that she had taken notes of this meeting she could not find them for production at the trial.

Howard Edelman or the office of the contract arbitrator (OCA).<sup>31</sup>

Moreover, Union Business Agent Daniel Gross testified that he had informed the maintenance employees that while the independent agreement would be the basis for any settlement, the Union had sanctioned a strike because the parties had reached impasse. Gross admitted that an object of the strike was to get the Respondent to sign a collective-bargaining agreement. In fact, when the striking employees indicated their desire to return to work sometime after the commencement of the strike, Gross testified that he told them, "Yes, I would've liked you to have stayed out longer because it probably would've helped us get the contract signed, but it's your decision, and I, you know, you have to make your own decision on it . . . ."<sup>32</sup>

Union Business Agent Dan Gross testified that on February 22, 1999, he appeared at the Respondent's premises and told employee Keith Robinson to inform the other maintenance employees that the Union had authorized a strike and to tell Angel Venzen, the acting superintendent, to shut down the boiler, this being for the safety of the tenants in the building, something Gross maintained was done in all the Union's strike situations. According to the testimony of Robinson he did what Gross had instructed him to do, whereupon Venzen then turned off the boiler and both he and Robinson went to notify management of the strike, that the boiler would be shut down and to surrender their keys to the building.<sup>33</sup>

Gross testified that he told the employees to take their belongings with them because once on the picket line, they were not to enter the Respondent's property, to shut down the boiler

and to take any licenses they have, to give their keys to the property to management and to tell management that the employees were going on strike and that the boiler would be shut off. Gross told the employees that if the Department of Sanitation came by, to show their picket signs and ask the Sanitation workers to honor the picket line. The record also establishes that persons other than Pratt employees, including workers from other buildings, joined the strikers on the picket line to show their support.

#### 19. What occurred on March 11, 1999

On March 11, 1999, Theurgy Brailsford, Keith Robinson, and Curtis Bailey met with Eunice Johnson and board members Faythe Gaskin and Joan Newsome-White in the boardroom on the Respondent's premises. It is undisputed that at that time Brailsford, Robinson, and Bailey requested to return to work. Gaskin asked if these employees were speaking on behalf of the other striking employees and they responded that they were only speaking on their own behalf. Johnson asked if the Union knew that these employees were requesting their job back and Brailsford answered, yes.

Brailsford testified that Johnson then said that it was not that easy to return back to work. Brailsford asked what it would take for the employees to return. Johnson responded that in order to return to work, the Respondent wanted the employees to obtain a letter from the Union stating that they were no longer represented by the Union. Brailsford repeatedly asked Johnson if the employees could return to work without getting this letter and Johnson, quite upset about his repetitious requests, consistently responded, no. Brailsford stated that Johnson said that because the Respondent was obligated to bargain with the Union, the Respondent needed a letter from the Union stating that all ties were severed between the employees and the Union in order to get the Respondent out of its legal obligation with the Union. Brailsford related that Johnson complained that the employees had no idea how expensive the Union was and that its medical plan and annuity were very high. Johnson commented that the Union was not willing to budge in the negotiations and Brailsford answered that as far as the employees knew it was the Respondent that was unwilling to negotiate. Johnson then repeated that in order for the employees to return to work, she needed a letter from them that they no longer wanted the Union to represent them. Both Brailsford and Keith Robinson testified that there was no discussion about contract negotiations at all at this March 11 meeting.

Brailsford testified that he then suggested the possibility of holding a meeting of board members, the Union, the tenants and the employees after the employees were reinstated to their jobs, to see who was failing to negotiate, since Johnson was telling the employees that the Union was the one unwilling to bargain, and also for the added reason to facilitate bargaining and try to reach an agreement. Brailsford denied that he ever suggested to Johnson that the employees sit down with the board of directors themselves to discuss contract issues. Brailsford then asked what would happen if the Union refused to give the employees such a letter and board member Newsome-White responded that they should go to the Labor Board to get answers to their questions. Brailsford testified that the question

<sup>31</sup> Apart from these open issues, by virtue of the Respondent's October 8 letter, each and every clause in the independent agreement was proposed by the Respondent and agreed to by the Union. Furthermore, the record establishes that the Respondent did not raise, and no other issues were discussed, during the bargaining sessions. Moreover, Johnson testified that other than wages, benefits, the arbitrator, and the length of the contract, the Respondent was aware of no other issues that might have caused the Union to go out on strike.

<sup>32</sup> Striking employee Theurgy Brailsford testified that upon advising Gross that he wanted to return to work from the strike, Gross said, "[H]e would prefer us to stay out for a little longer because we would have a better chance of getting a contract signed . . . ."

<sup>33</sup> Not finding Property Manager Eunice Johnson in her office they informed Johnson's secretary, Chantel Bennett, that the employees were going out on strike. Bennett then telephoned Johnson and Venzen told Johnson that the employees were going out on strike, the boiler would be shut down and he and Robinson were returning their keys to the building. Johnson testified that she had received a telephone call from Bennett who advised her that Venzen and Robinson were in her office and that the employees were going out on strike and were turning in their keys. Johnson then spoke to Venzen who told her the same thing. Johnson failed to include that she had been told by Venzen that he was shutting off the boiler. General Counsel objected to Johnson's testimony concerning the telephone conversation as hearsay and moved to strike it. I deny this motion. Hearsay is admissible in administrative proceedings where relevant and material and corroborated by other evidence in the record. As to credibility determination, I note that Chantel Bennett, an employee in the Respondent's control, was not called as a witness to support Johnson's testimony. More about the credibility of witnesses will follow herein.

Newsome-White told him the Board would answer was why the employees needed a letter from the Union stating that the Union no longer represented the employees in order for them to be allowed to return to work. The employees then left the building and went to the Board's Region 29 office.

Robinson's account of the March 11, 1999 meeting was similar to that of Brailsford. Robinson testified that after a brief greeting, he, along with Brailsford and Curtis, told Eunice Johnson that they wanted to return to work. Robinson stated that Johnson replied that the employees could not return to work until they got a written statement from Local 32B-32J stating that they no longer have ties with the Union.<sup>34</sup> The employees repeatedly asked why they needed the letter and Johnson upset, answered that they needed the letter because she said so. After the discussion about the letter that Johnson demanded, Robinson testified that Newsome-White stated that if the employees did not think that the Respondent was doing the right thing, that they should go to the Labor Board. Robinson explained that the conversation between the employees and Johnson focused on the letter the Respondent demanded that they obtain from the Union in order to return to work. In fact, Robinson testified that he remembered Johnson's demand for the letter so clearly because that was the "whole topic" of the March 11 meeting.

At the time of the trial, employee Curtis Bailey was hospitalized, indefinitely, with a very serious illness. Having made the requisite showing that the requirements of Federal Rules of Evidence 807 had been complied with. The judge admitted into evidence the affidavit of employee Curtis Bailey. Bailey's affidavit corroborates the testimony of Brailsford and Robinson with respect to all critical facts. Bailey's affidavit establishes that on March 11, after he, Brailsford, and Robinson requested reinstatement, Eunice Johnson said that in order for the Respondent to even consider their request for reinstatement, the employees had to provide the Respondent with a document stating that the employees are no longer affiliated with the Union.

In his affidavit, Bailey stated that Brailsford told Johnson that the employees had been told by the Union that, "if we returned to work, that would mean that we cut our ties with the Union." Bailey continued, "Johnson said that she would need a document, in writing, stating that we are no longer affiliated with the Union. Johnson told us that once we bring such a document to her, they would consider our proposal to return to work." Brailsford testified that neither he, nor any other employee, stated that Dan Gross told the employees that if they asked for their jobs back, that would mean that they were no longer connected to the Union. Brailsford testified that perhaps Bailey misunderstood what Brailsford was saying. Brailsford was adamant in his testimony that none of the employees said that they no longer wanted the Union to represent them. To the

contrary, Brailsford testified that the employees were still behind the Union representing them.

Moreover, by letter dated March 11, 1999, to Dan Gross, Robinson, Brailsford, and Bailey told Gross about their meeting with Johnson on March 11, wherein she required them to get a letter from the Union indicating there was no longer any ties or connection between the Union and these employees.

The Respondent's witnesses tell a different story than that related by the above-General Counsel's witnesses. While admitting that the employees made requests to return to work and that during the course of the March 11 meeting, the Respondent directed the employees to obtain a letter from the Union in order to return to work, they testified that the employees came to the Respondent because they were unhappy with the Union, wanted to sever their ties with it and wanted the Respondent's assistance in getting a new union. Newsome-White testified that at the March 11 meeting Eunice Johnson requested a letter from the Union stating that the employees no longer wanted the Union to be their union because the employees had said that they were divesting themselves from the Union and the Respondent wanted proof that they had severed their ties with the Union. Faythe Gaskin testified that Johnson had told the employees that "she would need verification from 32B-32J indicating that they were no longer connected with 32B-32J." Gaskin also testified that Robinson and Brailsford had asked if Johnson knew of another union to join and Johnson responded that she could not answer that.

Eunice Johnson testified that Keith Robinson repeatedly stated that because the employees had crossed the picket line to request reinstatement, they severed their ties with the Union. Johnson admitted that she told the employees that she could not take their word for this, and that she needed a letter from the Union to prove that the employees had severed their ties with the Union. Johnson suggested in her testimony that the employees wanted to talk to the Respondent's board of directors about getting a different union.<sup>35</sup>

## 20. The employees at the NLRB

At the conclusion of their meeting with the Respondent on March 11, 1999, Brailsford, Robinson, and Bailey, at the suggestion of Board Member Newsome-White, went to the National Labor Relations Board's Region 29 office. Arriving at approximately 4-4:30 p.m., Brailsford and Robinson met with Board Agent Sharon Chau, the information officer for that day, while Curtis Bailey waited outside in the car. The General Counsel's witnesses' testimony regarding this meeting between Board Agent Chau and the employees was detailed and mutually corroborative.

<sup>34</sup> After testifying that Johnson told the employees that they could not return to work until they got a letter from the Union, McGill asked Robinson whether Johnson said that the employees could not come back to work until they got a letter saying that they did not want to be in the Union anymore. Robinson did not waiver in his testimony, replying, "[N]o, [she] said no ties with the union."

<sup>35</sup> However, the testimony of the employees is consistent that at no time did they tell the Respondent that they were unhappy with the Union or that they no longer wanted the Union to represent them, and this was corroborated by the testimony of Union Business Agent Dan Gross. The employees denied asking the Respondent how to go about getting a different union and their testimony is further supported by the fact that being unhappy with their former Union, Local 2's representation, they sought out and secured Local 32B-32J as their bargaining representative through the Board's processes and knew full well how to change unions without any need for assistance from the Respondent.

Chau testified that the employees told her that they were employees of Pratt Towers who had been on strike for several weeks because they wanted to be represented by Local 32B-32J and that they had just come from a meeting with their manager, Eunice Johnson, during which they requested to return to work. The employees told Chau that Johnson advised them that in order to be reinstated they had to get a letter from the Union stating that they no longer wanted the Union and that the Union no longer represented the employees. Chau stated that she told the employees that this did not sound lawful, and that she would be happy to call Eunice Johnson about this. Chau called Johnson while the employees were in the information office, identified herself as an information officer of the NLRB and informed Johnson of what the employees had just reported to her. Whereupon, Johnson told Chau to call the Respondent's attorney, Kevin McGill, which she did. Chau testified that she told McGill that two Pratt Towers employees were in the information office, that they spoke to Eunice Johnson about returning to work after being on strike, and that Johnson asked them to produce a letter from Local 32B-32J stating that the Union would no longer represent the employees. Chau stated that McGill responded that he had already spoken to Johnson, and that the Respondent was prepared to reinstate the employees, but that they needed a few days to prepare a new schedule. McGill told Chau that the employees would receive a letter in the mail early the following week about returning to work. When Chau hung up the telephone, she reported her conversation with McGill to Brailsford and Robinson telling them that McGill said that he did not know why or did not understand why Johnson told the employees that they could not return to work and that they needed a letter from the Union. Chau told them that McGill said that the tenants and the board wanted the employees back to work.

Chau further reported that McGill said that the Respondent needed 1 week to make up the work schedule, and the employees would be back to work in a week. Chau then told the employees that, according to the Respondent's attorney, they would be receiving a letter the following week to return to work and that if they did not hear from the Respondent after 1 week, they should come back to the Labor Board. The employees then left the office.

Chau testified that either while the employees were still in the office or immediately after they left, she completed the information officer inquiry form in which she described the nature of the employees' inquiry. Chau testified that it was the practice of the Board to complete the form for every phone call or walk-in. The form, dated March 11, 1999, is consistent with Chau's testimony, including that the employees were told by Johnson that they would not be reinstated unless they obtained a letter from the Union that it no longer represented the employees. The inquiry form also indicates that Chau spoke with McGill, who said that the Respondent was prepared to reinstate them, and would notify the men the following week after working out the schedule.<sup>36</sup>

<sup>36</sup> At the time McGill told Chau that the Respondent was prepared to reinstate the employees, he knew that the Respondent had accused the

Kevin McGill's testimony regarding his March 11 conversation with Sharon Chau was not believable and less than forthright. McGill admitted that in the afternoon of March 11, he received a telephone call from Board Agent Sharon Chau who told him that Pratt Towers employees were at the NLRB, that they had requested to return to work from their strike and that Eunice Johnson told the employees that they "*needed a letter*" in order to return to work. Absent from McGill's testimony was the part of his conversation with Chau in which she told McGill that Johnson required a letter from the Union stating that the Union no longer represented the employees in order to return to work. Later, during cross-examination, McGill changed his testimony and stated that Chau told him that the strikers were told by Johnson that "*in order to come back to work, they needed a letter from the union saying that it was okay to come back to work.*" Thus, McGill admitted that Chau told him that Johnson requested a letter from the Union, and that she linked this letter to the employees' return to work. In response to the judge's question, McGill testified that Chau told him that Johnson advised the employees, "*that they needed a letter from their Union in order to come back to work.*" Again, McGill omitted the critical part of the conversation—that Johnson conditioned reinstatement providing a letter stating that they quit the Union.<sup>37</sup>

McGill testified that he told Board Agent Chau that he was going to recommend that the Respondent take the strikers back.<sup>38</sup> Thus, McGill denied that he told Chau that the Respondent had made a decision to reinstate the strikers. McGill

---

employees of some misconduct, including shutting off the boiler and clogging the laundry drains.

<sup>37</sup> It is hardly believable that Chau, who recognized from what the employees told her that it was possible that the Respondent unlawfully conditioned the strikers reinstatement, who then offered to call the Respondent and its counsel on behalf of the employees, and who carefully documented the nature of the employees' visit to the NLRB, would neglect to tell McGill that Johnson conditioned their reinstatement upon abandoning the Union. That is what the employees' inquiry was about. McGill testified that he told Chau that he had no idea what this "letter" could mean. His feigned ignorance, however, was belied by his later testimony that he "was well aware of his client's legal obligations in this area of law." Clearly, Chau and McGill were talking about the same thing—the unlawful conditioning of reinstatement upon the employees quitting the Union.

McGill, a labor attorney of 30-years experience, later testified, incredibly, during cross-examination that he did not know at the time of his conversation with Chau that it would be unlawful for the Respondent to condition reinstatement upon the employees' abandoning their membership in the Union. McGill then contradicted himself by testifying that, "as an abstract proposition of law, that conduct would be unlawful." McGill then testified, again, that this was not an issue that was raised or *even referred* to during his conversation with Chau.

<sup>38</sup> McGill testified that as of March 9, he had been aware of two acts of alleged misconduct, the boiler having been shut down, and the laundry room drain problem. Despite having knowledge of these purported acts of misconduct, which the Respondent and McGill professed to be "serious" acts, McGill testified that he was "going to recommend that [Respondent] take the strikers back." This puts in question McGill's and the Respondent's protestations that shutting the boiler and the laundry incident constituted conduct so "serious" that it warranted termination, as false.

stated that he told Chau that the strikers would be notified soon “about the response to their request for reinstatement.”<sup>39</sup>

From the above, and the mutually corroborative, consistent, and I find credible testimony of the General Counsel’s witnesses regarding this, especially the testimony of Board Agent Sharon Chau, the evidence shows that the Respondent, through its counsel, Kevin McGill, disavowed the condition imposed by Eunice Johnson and board of director’s president, Valerie Brooks, on the employees’ return to work, that of their abandoning the Union. The record conclusively establishes that the Respondent, by its counsel, informed the Board agent that the Respondent intended to reinstate the strikers and was now preparing a work schedule.<sup>40</sup>

## 21. What occurred on March 15, 1999

On March 15, Lawrence (George) Folkes and Angel Venzen met with the Respondent and made unconditional offers to return to work. Again, the Respondent conditioned their reinstatement upon their quitting the Union. The testimony of Folkes and Venzen regarding this was consistent, mutually corroborative, and given in a forthright manner.<sup>41</sup>

Folkes arrived at Pratt Towers before Venzen<sup>42</sup> and met with Eunice Johnson, Valerie Brooks, and Faythe Gaskin in the

<sup>39</sup> McGill objected to Chau’s entire testimony alleging, among other things, that this conversation was a privileged settlement discussion. McGill testified that Chau said that she was going to have to take a charge unless they could straighten out the problem. Chau denied making this statement. I found Chau to be a credible witness, testifying in a forthright and straightforward manner, and based on her demeanor, inherent plausibility, and other corroborative evidence in the record, I believe her rendition of her conversation with McGill.

<sup>40</sup> At the time McGill told Chau that the Respondent was prepared to reinstate the employees, he knew that the Respondent had accused the employees of some misconduct, including shutting off the boiler and clogging the laundry drains. As General Counsel asserts in her brief: “Thus, even if Respondent’s defense that it refused to reinstate the strikers for purported strike misconduct were credited, the evidence conclusively establishes that Respondent condoned at least this alleged misconduct if not all by agreeing to reinstate the employees.”

<sup>41</sup> A review of the record reflects that the General Counsel’s witnesses’ testimony during the trial was consistent with their affidavits on all material facts. Any discrepancies were minor, more in the manner in which something was said rather than in the substance of the testimony. The record reveals that none of these purported discrepancies involved material facts. For example, Folkes in his affidavit, stated that he waited for three other workers in the lobby on March 15, and he testified that he was waiting for Angel Venzen and Jude Obaseki. Clearly, such a minor variation casts no shadow on Folkes’ forthright and credible testimony. In addition, during cross-examination, Venzen testified that he first learned of the strike on the morning of February 22. In his affidavit, he stated that he was advised of the strike the week prior. It appears that this minor inconsistency has no bearing on any relevant issues, and in no way impugns Venzen’s otherwise forthright and credible testimony.

<sup>42</sup> Like the employees who requested reinstatement on March 11, Venzen and Obaseki went to Pratt Towers in the morning on March 15 and told the guard that they wanted to meet with Johnson. After calling Johnson on the phone, the guard informed the employees that she was busy, and directed the employees to return at 3 p.m. Venzen returned to the building at 3 p.m. Obaseki could not return at that time because he had to attend a class.

boardroom. Folkes testified that he told the Respondent that he wanted to get his job back, as soon as possible, to which Valerie Brooks responded, that he had to get a letter from the Union stating that the employees did not want the Union and that he was not in that Union anymore. Folkes related that the Respondent said that if he did not have the letter, the employees cannot return to work. Johnson said that the Respondent was investigating accusations that the employees broke locks and put cement in the laundry drain. Whereupon, Folkes emphatically denied that any of the employees would do such things, that they did not engage in such conduct.

Venzen now arrived at the premises and joined the meeting. Brooks asked Venzen what she could do for him and he answered that he wanted to return to work.<sup>43</sup> Venzen testified that Brooks then told Venzen that he would have to get a letter from the Union stating that the employees no longer wanted the Union to represent them.<sup>44</sup> Venzen stated that board member Gaskin said that, “it would be easier for [the employees] to get out of the Union by getting a letter stating that we no longer want the Union . . . it would be easier for [the employees] to do that, than for the building to do that,” because the Employer had a contract with the Union.<sup>45</sup> Venzen related that he asked about rumors the employees had been hearing that they sabotaged the laundry room, but the Respondent would not discuss the issue saying that the Respondent was investigating that problem, and therefore could not talk about it at that time.<sup>46</sup> The meeting ended by the Respondent telling the employees that they would get back to them at a later date. Apart from this March 15 meeting when Venzen requested reinstatement, Venzen did not have any other conversations with the Respondent about returning to work.<sup>47</sup>

<sup>43</sup> Venzen’s affidavit reads that he told Brooks that “the employees” wanted to return to work while Venzen testified that he told Brooks he was speaking for himself.

<sup>44</sup> While Venzen’s affidavit states that he “believed” it was Brooks who first mentioned the Union and the need for a “written statement from the Union saying that we no longer want the Union to represent us,” in his testimony he clearly indicated that it was Brooks who first brought up the Union and the need by the employees for a letter from the Union severing ties with it in order to return to work. I see no real significant inconsistency present in this.

Moreover, Folkes testified that Brooks had stated, “[T]hat we have [sic] to go to the Union to get the letter. Go to the Union, bring the letter, and soon that is possible you’ll get back the job.” Folkes was clear that it was the Respondent who first mentioned the Union.

<sup>45</sup> Venzen denied that Gaskin had actually said, instead, “It’s harder for the building to get you out of the Union.”

<sup>46</sup> After Venzen testified that Johnson prevented his effort to discuss the rumors of employee sabotage of the laundry room, McGill asked, Venzen “so there was apparently some discussion about sabotage.” However, the testimony establishes that there was no discussion about sabotage during the March 15 meeting.

<sup>47</sup> Venzen testified that after Keith Robinson requested reinstatement on March 11, Robinson told him that Eunice Johnson asked for a letter from the Union. Venzen’s testimony is corroborated by that of Lawrence Folkes and by the Respondent’s own witness, Faythe Gaskin. Moreover, Venzen further testified that Robinson told him that he went to the Labor Board, and a person there spoke to Johnson and the Respondent’s lawyer, and that the Respondent was going to put the employees back to work. Thus, rather than diminish Venzen’s credibility,

Eunice Johnson's testimony regarding the March 15 meeting was limited. Johnson testified only that Venzen and Folkes asked for their jobs back, and that Valerie Brooks said that she would take their requests back to the board of directors. Despite having testified at great length regarding the March 11 meeting with employees, Johnson could not recall anything else from the March 15 meeting.

Like Johnson, Brooks' testimony was devoid of details, since she too, could not recall what occurred during this important meeting. Brooks testified only that Venzen and Folkes requested reinstatement, and that she responded that she would take the request under consideration. Brooks claimed not to recall anything else about the meeting, except that Venzen had said that he was not satisfied with the Union. However, this contention was not corroborated by Eunice Johnson's account and her recollection of what occurred during the March 15 meeting.

Gaskin admitted when employees Folkes and Venzen requested reinstatement, both Brooks and Gaskin told the employees that in order to return to work, they needed to provide the Respondent with a letter stating that they were no longer connected with the Union.

On the morning of March 15th, Jude Obaseki went with Angel Venzen to Pratt Towers to speak with Eunice Johnson. Johnson was busy and asked the employees to return at 3 p.m. Obaseki testified that since he could not return in the afternoon because he had to attend a class, he telephoned Johnson that afternoon. After identifying himself to Johnson, Obaseki said that he was calling because he wanted to return to work.<sup>48</sup> Johnson told Obaseki to talk to Valerie Brooks, who was with Johnson and Obaseki then asked Brooks if he could come back to work. Brooks responded that Obaseki had to withdraw from the Union before he could return to work. Brooks also told Obaseki that the Respondent was conducting an investigation, but she did not tell him the nature of the investigation.<sup>49</sup> Obaseki said thank you, and hung up the telephone. Brooks did not tell Obaseki that he had done anything wrong.

In regard to her conversation with Obaseki, Brooks testified only that Jude Obaseki asked for his job back, and that she replied that the Respondent would "investigate" the matter and get back to him.

## 22. The board of directors' meeting on March 16, 1999

The strikers requested reinstatement on March 11 and 15. On March 16, the Respondent held an emergency closed meeting of its board of directors and the Respondent's counsel, Kevin McGill. The record establishes that the Respondent made its determination not to reinstate the strikers and not to

accept their unconditional offer to return to work, at this meeting, for the purported reason of their "misconduct" and apparently before the Respondent had concluded, or even started any investigation into the alleged strikers "misconduct." This is supported by the tape and minutes of the March 16 meeting in evidence and even by some of the testimony of the Respondent's own witnesses. However, it seemed to me that the Respondent's witnesses testimony denying this was generally evasive, contradictory, and unbelievable, and is contraverted by the other credible evidence in the record.

Eunice Johnson at first testified that during the March 16 meeting, the Respondent decided not to take the strikers back because of what it felt was the strikers misconduct. Johnson also admitted that the Respondent reached this decision before it had concluded its purported investigation into the alleged misconduct. Johnson then illogically changed her testimony to deny that the decision not to reinstate the striking employees was made at the March 16 meeting. Moreover, Johnson subsequently again admitted that the Respondent had decided at the March 16 meeting not to reinstate the strikers, pending its investigation of their alleged misconduct after being confronted with a copy of the minutes of the board of directors' meeting of March 16, 1999 which stated that, "after further discussion, there was consensus that the Board's position was not to take the men back." However, she again changed her testimony to deny that this decision was made on March 16 when she was shown a copy of her affidavit given to a Board agent which stated that the decision not to reinstate the striking employees was made on March 23.

McGill's testimony regarding the March 16 meeting resembled Johnson's in its evasiveness and inconsistency. McGill admitted that the tape of the March 16 meeting records Valerie Brooks stating that the strikers asked for their jobs back, and that the Respondent does not want that. When asked whether it was then fair to say that the Respondent decided to deny reinstatement as of March 16, McGill said, "[N]o. It is not correct." When pressed further, McGill testified that the other board members agreed with Brooks' statement that the Respondent did not want the strikers back, and that "that was the substance of the meeting. That's the very strong impression that I got." Mystifyingly, McGill again denied that the Respondent decided not to reinstate the strikers on March 16. Finally, McGill admitted that if the tape of the March 16 meeting records Eunice Johnson stating that it was the opinion of the board members not to take any of the strikers back, then it was said during the meeting. The tape and minutes of the March 16 board meeting establishes beyond a doubt that Johnson stated that it was the board's opinion not to reinstate the men.<sup>50</sup> Also, Brooks informed the board at this meeting that she had spoken to Local 2 to see if that Union would accept back the striking

Robinson's communication with Venzen explains why Venzen sought to meet with Johnson on March 15—he thought he would get his job back, too.

<sup>48</sup> Obaseki testified that he had not spoken to Business Agent Dan Gross, or to anyone from the Union, about his decision to request reinstatement.

<sup>49</sup> Obaseki in his affidavit, given to the Labor Board during the unfair labor practice investigation, did not include Brooks' statement about an ongoing investigation. Obaseki explained that at the time he gave the affidavit, it slipped his mind.

<sup>50</sup> General Counsel requested in her brief that the transcript of the March 16 and 23 meetings submitted by the Respondent should not be relied upon as being inaccurate and incomplete. Moreover, the Respondent represented that a professional company transcribed the tapes, but the transcriber is not identified at all, nor is it certified as being accurate. General Counsel requests that the judge rely on the cassettes themselves. I hereby grant the General Counsel's request.

employees as members after they decertify from the Union. Local 2 refused according to Brooks.

The Respondent's witnesses' admission and the tape of the March 16 meeting establish that the Respondent decided to deny reinstatement to the striking employees on March 16.<sup>51</sup>

At the Respondent's March 16 meeting, president of the board, Valerie Brooks, informed the board that "all of the men have come back for their jobs." Brooks then stated,

*"we don't want that. Somehow we were talking to Kevin McGill about, you know, the conditions and circumstances under which we could, you know, we could make that arrangement, okay?" And then we need to know what happens, May 1st is approaching so we need to know where we are so we can stall them, or you know, what our position is. "So, he was saying if we could prove misconduct on the part of one of the men, then that would be grounds not to have them back, okay?"*

McGill then spoke at this meeting about his conversation with security officer Kennedy, regarding any asserted misconduct that may have been present. McGill summed up his interview with Kennedy by stating that compared to strikes he had seen before, this one was very mild, and there were no violations of law by the strikers that he could discern. The board members searched for anything that could be used against the strikers, raising the possible issue of the Sanitation Department's refusal to pick up garbage at the beginning of the strike. After explaining that the Sanitation Department does not cross a picket line, McGill suggested that it would be helpful if they could demonstrate that the strikers physically impeded the pickup of garbage. Brooks then suggested that they speak to the security officer named Sal who might have information on the garbage pickup—after Sal returned from his vacation 1 week later. McGill testified that he told the board of directors that Kennedy had said that the strikers were cutting across the front of the building, trespassing on private property but while the strikers conduct was disrespectful it was not threatening. Later in this meeting, according to McGill, board member Brooks and Johnson raised the issues of the shutdown of the boiler, garbage collection, and verbal threats against temporary employees. Thus, the evidence reveals that the Respondent made its determination before completing its purported investigation of striker misconduct. Toward the middle of the meeting, McGill stated that, *"when we tell these individuals that we are not going to offer them reinstatement"* charges will definitely be filed against the Respondent at the NLRB. McGill's statement clearly indicates that a decision had already been made by the Respondent, not to reinstate the striking employees.

Finally, Johnson acknowledged that the tape of the March 16 meeting records her stating that, *"since it's the opinion of the board members that we're not going to take any of these gen-*

<sup>51</sup> The tape and minutes of the March 16 meeting also establish that as of March 16, the Respondent did not deny reinstatement because they suspected that the strike had been unlawful. This theory had not yet been conceived of by the Respondent's counsel and was only first raised to the board during its March 23 meeting.

*lemen's [sic] back, we can prolong it as much as we can."*<sup>52</sup> Moreover, Johnson asked whether the Respondent lost the opportunity to permanently replace the strikers.

By letter dated March 16, the Respondent advised all six employees that the Respondent was investigating reports of "Striker Misconduct." The Respondent's employees were expecting to receive a letter from the Respondent informing them of when to return to work after their meeting with Board Agent Sharon Chau at the NLRB. Instead, the employees received a letter dated March 16, signed by Eunice Johnson which stated,

In response to your recent request for reinstatement to your position at Pratt Towers, please be advised that management is currently investigating reports of strikers [sic] misconduct which occurred during the course of the strike. We have not concluded our investigation as yet but we expect that it will be complete within a few days. Accordingly, we will be in touch with you within the next week to inform you of our response to your request for reinstatement.

Thus, by its March 16 letter, it appears that the Respondent purposefully mislead the employees about the Respondent's answer to their requests for reinstatement and about the status of their employment, since as demonstrated above, by the time the letter to employees went out the Respondent had already determined that it was not going to reinstate any of them, even before it concluded its "investigation." The letter fails to state what alleged misconduct the Respondent was investigating. Also noteworthy is that nothing in the letter indicated that the Respondent was considering whether the strike was illegal, and nothing was ever said to the employees in that regard.

The testimony of each employee witness, and of the Respondent's own witnesses, conclusively establishes that the Respondent never told any of the strikers of what they were specifically and individually accused, not even when the employees met with the Respondent to request reinstatement. It is undisputed, and the Respondent admits, that the Respondent never contacted any of the employees to question them or to give them the opportunity to present a defense to any allegations.<sup>53</sup>

Brooks testified that sometime between March 16 and the March 23 board of directors meeting, she had a telephone conversation with the Respondent's counsel, McGill, during which McGill informed her that the evidence of striker misconduct was "questionable," "not concrete," and "not sufficient." McGill also informed Brooks, for the very first time, that in his opinion, the strike may have been illegal.<sup>54</sup> McGill testified

<sup>52</sup> Johnson also conceded that it was the Board's intention to prolong matters until May 1, when the Union's certification year was over.

<sup>53</sup> In fact, the uncontradicted testimony of Angel Venzen establishes that when he met with the Respondent to request reinstatement, he attempted to discuss with the Respondent rumors that employees had sabotaged the laundry room. Eunice Johnson prevented the discussion, stating that *because* the matter was under investigation, she could not talk about it.

<sup>54</sup> Brooks testified that she "thought" that McGill mentioned that the picketing clause of the independent agreement was illegal, although she did not know what this meant. She did not recall that McGill mentioned that any other provisions of the contract were illegal, adding that they were supposed to talk later.

that he did not form the opinion that the strike was illegal or unprotected until “after I examined the contract at length, subsequent to my meeting with the board of directors on March 16th . . . it might have been on March 18th or 19th.”

According to the testimony of Eunice Johnson, sometime between March 16 and 23, Johnson telephoned McGill and asked him to prepare a draft of a letter for Johnson to present to the Respondent’s board of directors at its scheduled March 23 meeting. The record establishes that Johnson asked McGill to prepare a letter *denying the strikers reinstatement*. McGill’s draft letter stated, “this is to advise you that the Board of directors of Pratt Towers *has voted* to deny your request for reinstatement.”<sup>55</sup> McGill admitted that Johnson did not ask McGill to prepare a draft letter with an alternative outcome, namely a letter reinstating the employees nor did McGill prepare any other versions or drafts.

### 23. The board of directors’ meeting on March 23, 1999

Respondent’s board of directors met on March 23, 1999. During the March 23 meeting, Valerie Brooks<sup>56</sup> read McGill’s draft letter to the Board.

Johnson testified that after some discussion, the board members decided to change the sentence “*all* of the strikers engaged in misconduct” to “*strikers engaged in misconduct*,” thus deleting the word “*all*.” The Respondent admitted that this change was made because not all of the strikers engaged in misconduct.<sup>57</sup>

Brooks’ testimony about the March 23 board meeting was inconsistent and contradictory. During direct examination by McGill, Brooks testified that during the March 23 meeting, the board members discussed whether or not to reinstate the strikers and the “misconduct” that the employees had purportedly engaged in. She testified that the board “probably” discussed the flat tire, “definitely” discussed the employees stopping the garbage collection, “probably” discussed the clogging of the laundry drains, the accumulation of garbage and the harassment of the temporary replacements. The cassette tape of the March

23 meeting reveals that there was no discussion among board members about whether or not to reinstate the strikers. It appears that this decision had already been made on March 16. Brooks further testified that she advised the board members that McGill told her that the strike might be illegal. Brooks testified that on that basis, “we really couldn’t reinstate” the employees, and that the board decided not to reinstate them because of striker misconduct and the illegality of the strike.

Valerie Brooks testified that McGill advised her that there was something illegal about the contract, and that technically the strike was illegal although she did not understand what that meant. Brooks testified that McGill mentioned something about the picketing clause, but nothing else and that “on that basis, we really couldn’t reinstate the employees.”<sup>58</sup> Brooks later admitted, however, that even though its counsel informed the Respondent that the strike might have been unprotected, the Respondent still could have reinstated the employees—had it wanted to.

It is undisputed that the board members were advised for the first time that the strike may have been illegal during the March 23 board meeting. McGill admitted that he did not review the Independent agreement until after March 16 looking for non-mandatory provisions and did not conclude that the contract contained illegal or nonmandatory provisions until March 18, 19, 20, or 21. McGill testified as to why he reviewed the contract looking for nonmandatory clauses, and why he did it on March 18 or 19. He testified that, “. . . we had had a request for reinstatement. We had to answer the request for reinstatement. I needed to be able to advise my client as their attorney what the board’s *options* were under the law. I did that.”

### 24. The March 24, 1999 letter denying reinstatement

By letter dated March 24, 1999, the Respondent sent each employee a letter of termination. The letter stated in pertinent part,

This is to advise you that the Board of Directors of Pratt Towers had voted to deny your request for reinstatement. This action is based upon our conclusion that the strike was not a protected strike under applicable law. In addition, strikers engaged in serious misconduct during the course of the strike.

The record shows that the Respondent never told the employees what exactly they were accused of except that they had heard a rumor prior to March 11, that the employees had supposedly caused damage in the laundry room. Moreover, the Respondent admitted that it had not been advised by its counsel McGill, that the strike “might possibly” be illegal until sometime after March 16 before the March 24 letter—after as the evidence shows, that the Respondent had already made its decision to terminate the strikers on March 16 and this was the first time this reason was asserted for terminating the strikers.

The Respondent contends that it refused to reinstate the striking employees because of alleged “striker misconduct” and

<sup>55</sup> Even though McGill drafted a letter stating that the board voted to deny reinstatement, McGill denied that the Respondent had “formally” decided that as yet. He added that, “. . . it was certainly my impression that, that’s the way it was going to be voted on.”

<sup>56</sup> During direct examination, Brooks testified that the board made its decision at the March 23 meeting not to reinstate the strikers. This testimony is contradicted, by the record evidence, that establishes that the Respondent made that decision during its March 16 meeting.

<sup>57</sup> Valerie Brooks testified that during the March 23 meeting, the board members reviewed the draft letter prepared by McGill for that meeting by which the Respondent was to notify the strikers that they were terminated. Brooks stated that the board members modified McGill’s draft letter by changing the phrase “all of the strikers” engaged in misconduct to just “strikers.” Brooks testified that the Respondent deleted “all” of the strikers because it would not be fair to the superintendent concerning the word “all” since he did not participate in the strike. During cross-examination, Brooks stated that the Respondent did not consider the superintendent to be a striker—because he did not participate in the strike. Thus, the Respondent had no intention of sending the termination letter to the superintendent. Brooks’ testimony was contradicted by that of Johnson, Gaskin, and Newsome-White, who testified that, the Respondent modified the draft to reflect, the fact that, not all of the strikers engaged in misconduct.

<sup>58</sup> Brooks initially testified that during the March 23 meeting, the board voted to deny reinstatement because of “the strikers’ misconduct.” She mentioned the “illegal strike” as an afterthought. Brooks inconsistently testified that the board decided not to reinstate, “for those two reasons.”

because the strike was unprotected. It is undisputed that the Respondent made its decision to terminate, and did terminate the strikers on March 16, 1999, before it concluded any purported “investigation” of alleged striker misconduct. The evidence shows, and the Respondent’s own witnesses admitted, that the Respondent terminated the strikers without ever telling any of them what specific acts of misconduct they were accused of, and without giving any of them an opportunity to defend themselves. Moreover, Eunice Johnson admitted that three of the striking employees, Curtis Bailey, Lawrence Folkes, and Jude Obaseki, did not engage in any misconduct whatsoever. She also testified that the only misconduct Angel Venzen is alleged to have admitted was turning off the boiler just before commencing the strike. However, the Respondent maintained that Theo Brailsford had prevented the garbage from being put out on the second day of the strike and that Keith Robinson had harassed or threatened replacement workers. Also, Brooks testified that McGill had told the board of directors that the allegation of striker misconduct was “questionable” and “not concrete” an insufficient basis upon which to deny the strikers reinstatement.

#### 25. The alleged incidents of striker misconduct

The Respondent’s witnesses testified extensively to asserted incidents of alleged misconduct which constituted one of the purported reasons for which the Respondent denied the striking employees reinstatement, the other being that this was an illegal and unprotected strike.

#### 26. Accumulation of trash

During the trial, the Respondent contended that the excessive number of trash bags that had accumulated in the trash room on the second day of the strike was part of the misconduct for which the strikers were denied reinstatement.

The evidence establishes that before the strike, the maintenance staff brought garbage and recyclables to the compactor room in the basement, where it was stored until trash pickup on Wednesdays and Saturdays. Tenants also put garbage down the chutes on each floor, which led directly to the trash compactor. The record also shows that on January 8, before the strike began, the Respondent created and implemented a strike plan. Pursuant to the strike plan, the Respondent closed the compactor room and gave tenants their own garbage bags to fill. The excessive amount of garbage the Respondent complained of was discovered on Tuesday evening. It is undisputed that the striking employees left the building as of 9:30 a.m. Monday, February 22 when the strike began, and did not enter the building during the strike.<sup>59</sup>

Valerie Brooks testified that on Tuesday, February 23, the day after the strike began, there was a significantly greater amount of garbage bags accumulated in the trash room than usual. Brooks stated that the “normal” amount of garbage was 50 bags; on the day after the strike began, there were “definitely more than 50; 75–80 bags. During cross-examination, Brooks, however admitted that she never actually counted the

number of trash bags in the compactor room. Rita Bryant, a tenant at Pratt Towers testified that there were approximately 100 bags of trash there.

The evidence establishes that when the strike began, the Respondent closed the compactor room and did not use the trash compactors. Brooks admitted that compacted garbage is smaller than the uncompacted garbage after the strike began, and therefore would require fewer bags. Brooks also admitted that sometimes, tenants generate more garbage due to moving, parties, and cleaning and that the maintenance employees did not generate the garbage in the building, but that it is generated by the tenants. Brooks never testified as to which strikers the Respondent blamed for the extra trash bags.

Eunice Johnson also testified that before the strike, on a “normal day,” there were 45–50 bags of garbage in the compactor room and that on the second day of the strike, there was “more garbage than normal piled there.” Johnson admitted that she did not know why there was more garbage. Despite having testified on direct that pursuant to the strike plan, tenants were bagging their own garbage, on cross-examination, Johnson contradicted herself, testifying that she did not know who bagged and piled the garbage because she did not see it for herself. Johnson then testified that it must have been the employees, “because who else would do our garbage. Certainly not the residents, your Honor.” Next, Johnson contradictedly admitted that she did not know who piled up the “extra” garbage, and that “it might have been the residents.” In fact, during her testimony about the extra garbage, there was no mention of any strikers being involved.

The employees denied that they piled up extra garbage bags in the compactor room.

#### 27. Alleged harassment of temporary replacement employees and tenants

The Respondent contends that on the second day of the strike, the striking employees “harassed” and “threatened” the replacement workers as they put out the garbage. The Respondent also contends that during that “incident” Theo Brailsford pushed the garbage cart as Eunice Johnson tried to take the trash to the curb, and that Keith Robinson threatened the replacement workers.

Brooks testified that unnamed “strikers” “were harassing and threatening” the temporary replacement employees and prevented them from taking the garbage from the gate out to the curb. Brooks failed to specify the conduct that was supposedly threatening or harassing. When asked which strikers threatened and harassed the temporary replacements, Brooks testified, evasively, that she saw Theo, Keith, and Angel “out there.” Noticeably, Brooks did not testify that she saw these employees *do* anything, just that they were “out there.”

Temporary replacement worker Anibal Soriano testified on behalf of the Respondent.<sup>60</sup> Soriano testified that on his first

<sup>59</sup> The employees only re-entered the building on March 11 and 15, when they met with the Respondent to unconditionally offer to return to work.

<sup>60</sup> It was established during Soriano’s testimony that when he was interviewed by the Respondent in preparation for trial, the Respondent failed to give Soriano the assurances required under *Johnnie’s Poultry*. In addition, his demeanor was hostile and his memory poor. Soriano testified in Spanish, and it unclear how much English he understands. In addition, Soriano testified that he was first questioned by the Re-

and second days of work, Robinson told him that the employees were on strike and that the replacements should not come to work. Soriano stated that on one day, Robinson threatened to break his face. Soriano testified that he said nothing in response.

Soriano testified that the following day, some people on the picket line tried to block him from taking out the trash, but it was not Robinson. Soriano related that "the strikers" dumped garbage on the street but Soriano did not know the names of the persons who did this; therefore, it could not have been Brailsford or Robinson, whom Soriano did know. Soriano did not even know if the persons he saw were employees of the Respondent. Soriano finally testified, after his recollection was refreshed, that Robinson had threatened to damage his car which was parked on the street. Soriano's car was in fact broken into at some point in time and his tools stolen. However, no one saw what happened regarding the break-in.

Daryl Thomas-Bennett<sup>61</sup> also hired as a temporary employee, after the strike started and a witness for the Respondent, testified that on several occasions he was a victim of harassment. Bennett testified that the strikers questioned him concerning whether he lived in the building, and prevented him from taking out the garbage. Bennett stated that there were several strikers there but he did not know them nor did he know if all the people with picket signs were the striking employees since there were supporters picketing from other buildings. However, Bennett related that some unidentified person told him that the strikers' name was Keith. A security guard, possibly security officer Elliott Holloway came over to Bennett during this incident and asked if the strikers were threatening him, and Bennett replied, no. The strikers then asked Bennett to call Johnson out because they were not going to let the trash be taken out.

Rita Bryant, a tenant of Pratt Towers, testified that on February 23 while attempting to put out her garbage on the sidewalk, being assisted by Daryl Thomas-Bennett, a newly hired temporary employee, Theo Brailsford and other striking employees, stopped her by pushing against the trash cart to prevent its movement and telling her that "we were interfering with their jobs." She stated that the manager of Wells Fargo Security was called and he appeared since he was concerned about the safety of his security men hired by the Respondent during the strike.

spondent about the events he testified to 1 week prior to trial. Therefore, those events could not have been relied upon, by the Respondent in deciding to deny reinstatement.

Soriano admitted that he understood only a part of what Robinson had said to him, knew he would lose his job if the striking employees were reinstated and was not told when questioned by McGill or Johnson that he was not required to speak to them or that the Employer would not retaliate against him for refusing to do so (*Johnnie's Poultry Co.*, 146 NLRB 770, 774-776 (1964)).

<sup>61</sup> Regarding his credibility, Bennett was evasive and non-responsive. He refused to answer questions on cross-examination, notwithstanding an admonition from the administrative law judge. His demeanor was less than that of a truthful witness. Moreover, Bennett admitted having been convicted of a crime but not of the crime of perjury. Bennett also admitted being a contestant in "a lot of fights." It also should be noted that the Respondent failed to give Bennett the assurances required under *Johnnie's Poultry*, supra, when he was interviewed in preparation for trial.

Eunice Johnson then arrived, called the police department, and upon the arrival of the police, the garbage was put out on the curb without further incident. This incident was documented by Wells Fargo Security Officer Merikah Watkins in an incident report form stating: "Maintenance workers that are on strike were stopping tenants from throwing the garbage out on the DeKalb side . . . NYPD was notified about the situation and they responded and defused the situation." However, Watkins was never called as a witness. According to Bryant, the strikers, including Keith Robinson, continued to say that they were interfering with the employees' jobs.

Bennett testified that on another occasion while he and other temporary replacement employees were attempting to take out the garbage, Keith Robinson and two unidentified neighborhood residents, who were not strikers, approached them. The two men threatened the temporary employees with physical harm while Robinson stood by and said nothing. Bennett conceded that he returned threats back to the pickets equal to those he received. Bennett stated that in the last conversation he had with strikers Theo Brailsford and Keith Robinson during the picketing, they told him that they had no problem with him and it appeared to Bennett that they were attempting to make peace with him. Bennett even testified that the strikers offered to try to get him a permanent job at Pratt Towers. Holloway testified that he had witnessed possibly this incident and removed the temporary employees into the building.

Eunice Johnson testified that when the strikers did not allow the temporary replacements to put the garbage out, she told the replacement workers to go inside and she and tenant Rita Bryant pushed the garbage cart toward the curb. Johnson stated that as she pushed the cart, Theo Brailsford pushed back against it. Johnson testified that Brailsford said that the replacement workers were taking their jobs, and that they could not put the garbage out to which Johnson said, no problem, that the tenants would put the garbage out. Johnson testified that from that point, she decided that the temporary replacements would bag the garbage and bring it to the gate, and that the tenants would take it from the gate to the curb.<sup>62</sup> Johnson admitted that other than this one incident on February 23, there were no other problems regarding putting out the trash.

Theo Brailsford testified that while picketing on the second day of the strike, he spoke to the replacement workers, and they agreed that they would take the garbage only to the fence. He denies that he pushed the garbage cart. This is corroborated by the testimony of other employees, including Keith Robinson and Jude Obaseki. Obaseki testified that he witnessed Theo Brailsford stand in front of a garbage cart being pushed by Johnson, but he saw Brailsford step aside once a security guard asked him to. Obaseki stated that he never saw Brailsford push the cart.

Keith Robinson testified that while picketing, he told the replacement workers that they were taking his job and he asked them to respect the strike. After a discussion with the replacement workers, they agreed that they would bring the trash only

<sup>62</sup> The record demonstrates that even prior to the strike, the Respondent's strike contingency plan provided that tenants would take the garbage out to the curb.

to the gate and would not take it all the way to the curb. Robinson testified that the employees shook hands on the arrangement.<sup>63</sup> This arrangement was followed throughout the strike. Robinson denied that he left the picket line and brought back neighborhood guys to coerce the temporary replacements. He consistently testified that he did not leave the line. Robinson testified that other persons, not only Pratt Towers' employees, joined the picket line, and they may have yelled at the replacement workers. Robinson denied that he ever told the replacement employees that he was going to kick their asses, or threatened to "break Soriano's face."

The record evidence, including admissions by the Respondent's witnesses, shows that the trash got put out that day, and that there were no further incidents involving the removal of trash thereafter.

The record establishes that the strikers' interaction with the replacement workers at the beginning of the strike was neither harassing nor seriously threatening. Instead, the strikers attempted to inform the replacements about the strike and the impact that the replacement workers had on their jobs.

#### 28. The department of sanitation—garbage removal

The Respondent contends that part of the "misconduct" for which the strikers were denied reinstatement was because of the New York City Department of Sanitation's (DOS) refusal to pick up the Respondent's generated garbage and that the striking employees prevented the pickup from happening. Brooks testified that one basis for denying the strikers reinstatement was that the DOS would not cross the picket line until the Respondent obtained a health order. Brooks blamed the men on the picket line for the Sanitation Department's failure to pick up the garbage and for making the tenants put the garbage out on the curb. Brooks further testified that she had to implement a policy for the tenants to bring the garbage to the curb, because of the strikers and the way they were behaving on the picket line. Yet, Brooks next testified that the policy was actually created in April 1998, when the Respondent began preparing strike contingency plan to address how garbage would be removed from the building in the event of a strike. It was as early as January 8, 1999, well before the strike began, that the board of directors decided, and informed the tenants that they would be responsible for putting garbage out to the curb. It is also a fact that as early as January 8, 1999, as part of the same strike contingency plan, the board of directors determined should a strike occur the compactor would be sealed. Soon afterward Brooks found out that the New York City Department of Sanitation does not cross picket lines and that the only way they will cross a picket line is for the building to obtain a health order.

The Respondent failed to explain why the DOS policy not to cross a picket line was considered by the Respondent to be misconduct on the part of the striking employees. Upon Brooks being asked if "... after you learned that the Sanitation Department, based on their own policy, honors picket lines, does

not cross picket lines, did that change your mind about that aspect of what you contend to be striker misconduct?", Brooks responded, "Policy yeah I guess it would." However, Brooks also testified that the strikers engaged in misconduct not because of the DOS policy, but by actively restraining the pick up of garbage.<sup>64</sup> Brooks related that someone had told her that because DOS is unionized they don't cross picket lines and won't pick up garbage if "they feel they're going to have any confrontation."

Johnson testified that she called the Department of Sanitation (DOS), stating,

they said to me that Sanitation will pick up the garbage, they had no problem with that. However, if Sanitation arrives to pick up the garbage and there is—the guys are picketing and there's any type of disturbance, they will not interfere . . . and, this is what Sanitation said to me, that is what would happen when they came to pick it up, and under those circumstances, they would not pick up my garbage and that's why they didn't.

Johnson never identified which striker or strikers if any were responsible for the DOS refusing to pick up trash.<sup>65</sup>

The Respondent also called as its witness, Wells Fargo Security Officer Elliot Holloway who testified that "one striker" pulled a jeep between the garbage and the sanitation truck, and that the sanitation workers said they would not pick up the garbage. Holloway stated that he thought that Theo Brailsford was driving the jeep. Holloway added that he also saw Curtis Bailey speak to the sanitation truck driver but could not overhear what was said. Brailsford denied ever having blocked the DOS from picking up garbage.

#### 29. The jammed lock

The Respondent's witnesses suspected that strikers jammed and broke the lock with a nail on the gate at the back of the DeKalb side of the building but the Respondent proffered no probative evidence to substantiate this accusation. Both Valerie Brooks and Eunice Johnson testified that on Friday, 4 days after the strike began, the Respondent's tenants proceeded to take their garbage out when they found that the padlock on the gate was jammed with a nail. This angered the tenants. The record establishes that over 500 tenants live in the Respondent's building. Although the Respondent purportedly held the strikers responsible for the broken lock, Valerie Brooks testified that the Respondent did not know who broke the lock, and that, in

<sup>63</sup> This testimony was corroborated by the Respondent's own witnesses, temporary replacement workers Anibal Soriano and Daryl Thomas-Bennett.

<sup>64</sup> The Respondent purportedly learned of an incident of this from special officer "Pat" but failed to call him as a witness to testify on its behalf and there is no written incident report concerning the alleged occurrence. This unexplained failure to produce relevant, and material witnesses and/or reports raises an adverse inference that the witness or report would not have supported the Respondent's position. *Johnson Freightlines*, supra; *Bay Metal Cabinets, Inc.*, 302 NLRB 152 (1990), enf. 940 F.2d 661 (6th Cir. 1991); and *Redwood Empire, Inc.*, 296 NLRB 369 fn. 1 (1989).

<sup>65</sup> It is interesting to note that at the Respondent's March 16 board meeting, McGill advised the Respondent that DOS employees usually do not cross picket lines to pick up garbage and when this occurs, it is not attributable to strikers unless it can be shown that in some way the strikers physically impeded DOS from collecting the garbage.

fact, it could also have been any of the Respondent's tenants. Johnson also admitted that she did not know who jammed the lock, and that the Respondent had no evidence attributing the problem with the lock to any of the strikers.

### 30. Garbage strewn on the Respondent's premises

The Respondent also accused the strikers of strewing garbage into the Respondent's yard. Brooks testified that on one occasion, garbage that had been put out was thrown back on to the premises. Brooks did not testify as to when this happened, or to which of the strikers threw the garbage. Brooks admitted again, that the Respondent did not see who threw the garbage, and that for all the Respondent knew, it could have been anyone in the building, or even the temporary replacements. Brailsford denied throwing any garbage around in the streets.

Johnson also admitted that neither she nor Brooks actually saw any of the strikers throw garbage around. In fact, Johnson admitted that the Respondent had no evidence that the strikers were responsible for throwing garbage. Moreover, a Wells Fargo serious incident report, dated February 24, completed by Officer Holloway establishes that on February 24, an intoxicated female entered the Respondent's premises, "creating a mess, overturned garbage cans." Sorino at first testified that he saw some men carrying signs who broke open garbage bags which he was putting out. However, he then testified that he never saw these people actually touch the garbage.

### 31. Brooks' alleged confrontation with Theo Brailsford

One of Respondent's reasons for denying strikers reinstatement as misconduct was the purported "confrontation" between Valerie Brooks and striking employee Theo Brailsford. According to Brooks, on Tuesday, February 23, she left the building with the Respondent's secretary, Chantel Bennett, to go to a deli down the street to get breakfast. Brooks testified that as she crossed the street, Theo Brailsford drove up in a car and then followed her down the street, yelling that she was taking food out of his family's mouth. Brooks stated that Brailsford held the door to the deli closed as she tried to open the door, and when she successfully did so, Brailsford then went away. Brooks admitted that when she came back, "there was no—he didn't do anything else after that when I came back. There was no contact between us at all."<sup>66</sup>

Brailsford denied that he ever followed Brooks down the street. He testified that he was certain of this because he had no contact with Brooks during the strike, at all, except when he asked for reinstatement to his job.

Eunice Johnson testified that the alleged incident between Brooks and Brailsford formed part of the basis for denying strikers reinstatement, even though no other strikers were implicated in this incident apart from Brailsford. Furthermore, it is undisputed that the Respondent never questioned Brailsford about the alleged incident and never allowed him to present his side of the story.

<sup>66</sup> The Respondent did not call Chantel Bennett, who continues to work in the office at Respondent's facility, as a witness. The Respondent's failure to call Bennett to corroborate Brooks testimony gives rise to an inference that Bennett would not have supported Brooks testimony as to this incident. See *Johnson Freightlines*, supra.

### 32. The slashed tire

During the trial, Brooks testified that on February 23 on her way from the deli back to the building, she noticed that the front left tire of her car, which had been parked in the driveway, was going flat. Brooks testified that one reason the strikers were denied reinstatement was because the air was let out of her tires. She admitted that she never saw any employee do anything to her tires, and admitted that this "misconduct" was relied upon even though she had absolutely no idea who, if anyone, let the air out of her tire.

The Respondent admitted that during the course of the strike, the Respondent's tenants heard rumors that the Respondent, and Valerie Brooks in particular, accused the striking employees of slashing Brooks' tires. Brooks admitted that between February 22 and March 23, the Respondent did nothing to dispel these rumors. During an open meeting of shareholders, Brooks was confronted by an angry shareholder, Brenda Worthington, who denounced the rumor, whereupon, Brooks admitted that her tires had not been slashed. Brooks testified that at this meeting she "clarified" the rumor to the shareholders, telling them that her tire went flat.

### 33. The clogged laundry drains

Among the various reasons proffered for denying the strikers reinstatement was the accusation that they sabotaged the laundry room by putting cement in the drains. Valerie Brooks testified that on the morning of Tuesday, February 23, the second day of the strike, she started to do her laundry when the drain backed up and flooded the floor of the laundry room. Brooks stated that Roto-Rooter came and advised the Respondent that there was cement in the drain. The evidence establishes that the laundry room is open from 6 a.m. to 10 p.m., but one needs a magnetic swipe card to enter. At other hours, no one can enter the laundry room except, for the superintendent and security guards who have access at all times.

Brooks testified that she did not see the strikers enter the building while picketing. In addition, the Roto-Rooter bills do not indicate, as the Respondent's witnesses testified, that there was cement in the drains. Instead, they show that there was heavy dirt and lint and some rocks, as Brooks admitted. Brooks stated, that she had no idea how the rocks got in the drain, nor did she know who put them there. In fact, Brooks admitted that the rocks could have been in the pipes from construction years ago.

Johnson also admitted that the Respondent had no evidence that any strikers did anything to cause the backup in the laundry room drain, yet this did not deter the Respondent from considering that event as a basis for denying the strikers reinstatement.<sup>67</sup> Johnson stated that the topic of the laundry room was mentioned at the March 16 meeting of the board of directors.

<sup>67</sup> The evidence demonstrates that the Respondent, did not conduct an investigation of this problem to ascertain who, if anyone, clogged the drain. The evidence also reveals that the computer swipe cards used to gain entry into the laundry room are linked to a computer that keeps a record of who enters and at what time. The Respondent admitted that no check was made of the computer records. Moreover, the Roto-Rooter plumber was never called as a witness to corroborate any of the Respondents' witnesses accusation. Nor did the Respondent

Faythe Gaskin also testified that the board had no proof that the strikers had been responsible for clogging the laundry room drains. She stated that it was simply assumed that Angel Venzen was responsible for this alleged act of sabotage. Gaskin related that since 1964, the inception of the building, and for as long as she had lived there, the laundry room had never had a clogged drain. However, Brooks testified that this is not the first time the laundry room has flooded, as a matter of fact it has happened often, as recent as 6 months prior to the February 23 flooding incident.

The Respondent's witnesses admitted that the board of directors had no proof that the striking employees were responsible for the clogging of the laundry drains yet they considered this an act of misconduct on the part of the strikers as one of the reasons for denying them reinstatement.

#### 34. Shutting off the boiler

Another reason the Respondent asserted that it denied reinstatement to all strikers was because they shut off the boiler. This was considered one of the more serious of the infractions. The evidence establishes that on the morning that the strike began, Angel Venzen turned off the boiler, pursuant to the instructions of Union Business Agent Dan Gross. Gross testified that the boiler was shut off in order to protect the Respondent's property and tenants from any mishap that could result from the boiler being on but not monitored. New York City regulations even state that boilers must be maintained by the person on the premises, and that the license holder is liable for damage. The boiler was turned on at 7:30 p.m. that same day.<sup>68</sup>

Angel Venzen, testified that he and Keith Robinson, went to the Respondent's office and told Eunice Johnson's secretary, Chantel Bennett, that the employees were going on strike and that he needed to speak to Johnson. Bennett got Johnson on the telephone, and Venzen told Johnson that the employees were going on strike, that he was turning in his keys, and that he had shut down the boiler for safety reasons.

Johnson admits that Chantel Bennett called her and advised her that the employees were going on strike, but denies that she spoke to Venzen that morning. The Respondent did not call Chantel Bennett as a witness, although Johnson testified that the Respondent spoke to her about testifying and told her she might possibly be a witness.<sup>69</sup>

---

question any of the striking employees about this. See *Johnson Freightlines*, supra.

<sup>68</sup> Johnson testified that an unnamed tenant came to the office in the afternoon saying that "it seemed a little cool today, but again it wasn't very, very cold at that point in the building." Johnson stated that board vice president, John Porter, turned the boiler back on, with the assistance of the superintendent, some time that evening. Johnson's testimony contradicted the affidavit she gave in connection with the unfair labor practice investigation. In her affidavit, Johnson swore that on the day after the strike, she called a heating contractor who informed her for the first time that the boiler had been turned off.

<sup>69</sup> The unexplained failure to call Chantel Bennett as a witness for the Respondent to corroborate Johnson's testimony as to this, under the circumstances present in this case, gives rise to a strong inference that her testimony would not support the Respondent's contention nor Johnson's rendition of what happened. See *Johnson Freightlines*, supra.

Johnson testified that the boiler is checked at the beginning and end of the day, usually by the superintendent or by the handyman. During cross-examination, Johnson stated that after the employees went on strike, the Respondent hired a boiler maintenance company to check the boiler every day "because its worth it for me to know that the building is safe." Johnson admitted that if the boiler is not maintained and checked every day, it could create an unsafe condition. Brooks, too, agreed that the boiler must be monitored daily or else it is dangerous.

Johnson also testified that had the strikers notified the Respondent that they were shutting off the boiler, it would have been less serious misconduct. Johnson admitted that she never asked Venzen why he turned the boiler off. Johnson stated that she never considered the possibility that Chantel forgot to tell her that Venzen was shutting the boiler down, and admitted that it was possible that Chantel could have forgotten to relay this to Johnson.

Moreover, Johnson testified on direct examination that the first day of the strike was a cold day, "one of the coldest days of the winter." Johnson did not testify as to what the temperature was, or how she happened to recall this detail. Later, she contradicted her testimony, stating that in the late afternoon, it was not yet very cold in the building.

Shutting off the boiler could not have been the "serious" act of sabotage that the Respondent claimed. McGill testified that he knew of the boiler having been shut off (along with one other alleged act of misconduct) as of March 9, and yet on March 11, he told Board Agent Sharon Chau that he was going to recommend that his client reinstate the strikers.

#### 35. Walking on Respondent's walkway

The Respondent alleged another act of "misconduct" for which the employees were terminated, that of using the Respondent's walkway between DeKalb and Lafayette Avenues. The evidence demonstrates that the Respondent never advised the employees that they were no longer allowed to use a path they were privileged to use before the strike. In addition, it is hard to imagine how Respondent could contend that this was an act of "serious misconduct."

Eunice Johnson testified that she did not know which employees walked on the walkway, but she was certain that Obaseki and Folkes did not. Johnson admitted that the public uses that walkway as a means of getting from one street to the other without having to walk around the entire building. Johnson also admitted that the Respondent never promulgated any rules prohibiting strikers from using the walkway, nor did it instruct the strikers not to use the walkway. Johnson stated that she "assumed" that they had been told, that they could not use the walkway but did not know this for a fact.

Keith Robinson testified that the Respondent never told the employees that they could not walk on the walkway. In fact, Robinson frequently used the walkway before the strike because he lives right across the street.

With regard to the above-alleged incidents of striker misconduct, Valerie Brooks testified to several such occurrences blamed on the strikers including: more than the normal amount of garbage accumulated in the trash compactor room; harassing temporary replacements on the second day of the strike while

they tried to put the garbage out on the curb; responsibility for the Department of Sanitation's refusal to cross the picket line without a health order; the jammed lock on the back gate; garbage strewn on the Respondent's premises; a confrontation between Theo Brailsford and Brooks while on her way to a nearby deli; a flat tire; and cement in the laundry room. It is noteworthy that Brooks failed to mention that the employees engaged in misconduct by shutting off the boiler, presumably one of the more serious and inexcusable acts of misconduct by the strikers. Interestingly, Brooks, during cross-examination, added another reason that the Respondent also relied on as to what they were told by a security officer. Brooks did not mention which officers or what they reported to the Respondent.

Brooks also testified that during the March 23 meeting of the board of directors, the board members discussed various acts of misconduct allegedly engaged in by the strikers, including Brooks' flat tire, stopping the garbage collection, clogging laundry drains, garbage accumulating in the basement, and harassing the temporary workers. However, the cassette tape of the March 23 board meeting reveals that the topic of alleged strikers misconduct was not discussed at all.

Johnson testified about the following events as being misconduct on the part of the striking employees: that on the second day of the strike, strikers impeded the replacement workers in putting the garbage out to the curb; the boiler shutdown; more garbage than normal having accumulated in the trash compactor room; and the Department of Sanitation refusing to pick up trash until Respondent obtained a health order. Johnson testified that shutting off the boiler was one of the incidents of "serious misconduct" for which the strikers were not reinstated.<sup>70</sup> Johnson admitted that had the strikers informed the Respondent in advance, it would have been less serious conduct.

Johnson contradicted the testimony of Valerie Brooks. When asked whether the extra garbage in the trash room was part of the misconduct for which the employees were denied reinstatement. Johnson replied, "[N]ot directly, no, we didn't go after them because there was more garbage bags, no." Johnson testified that another act the Respondent considered to be striker misconduct was that they walked through the walkway between Lafayette Street and DeKalb Avenue. Johnson also added the alleged confrontation between Valerie Brooks and Theo Brailsford as another reason why the strikers were denied reinstatement (even though Brailsford was the only striker alleged to have been involved) the clogged laundry room drain and that another act of "serious misconduct" was that garbage had been strewn all over the fences.

Johnson related additional reasons that the Respondent denied the strikers reinstatement. Johnson testified that the incident reports from the security officers were part of the "misconduct" upon which the Respondent denied the strikers rein-

statement.<sup>71</sup> Including an incident report from Officer Holloway that he observed Keith Robinson

walking from DeKalb Avenue towards Lafayette Avenue. He stop [sic] to say hello to me then I left to come in building, and he was talking with a tenant from the building, then he left . . . nothing out of the ordinary happened.

Johnson testified that the Respondent relied on Holloway's incident report because the strikers were not allowed on the Respondent's property—even though the incident report is dated March 27—days after the strikers were already terminated. When confronted with the impossibility that the Respondent relied on an incident report dated after the employees' termination, Johnson changed her testimony and now testified that the incident was not a basis for denying the strikers reinstatement.

Faythe Gaskin also testified about the reasons upon which the Respondent based its decision to terminate the strikers. Gaskin testified that the strikers "cut off the hot water."<sup>72</sup> She testified that was an act of misconduct relied upon by the board of directors, although she, herself, did not consider that to be serious misconduct. Gaskin testified that the strikers didn't let the oil trucks come in.<sup>73</sup> Gaskin said that "as to the laundry room . . . I don't know for sure, but I know that we couldn't do any laundry because something had happened in the laundry room" and that something blocked the pipes.<sup>74</sup> Gaskin testified that another act of misconduct was that Venzen had been seen bringing his children to their babysitter in the Respondent's facility. No other witness for the Respondent testified to this act of misconduct.

Gaskin also added to list of misconduct relied on by the Respondent that UPS drivers did not cross the picket line. According to Gaskin, the Respondent also factored into their decision the Department of Sanitation's initial refusal to cross the picket line because it was inconvenient for tenants to bring their garbage down. Gaskin also testified that part of the decision to deny reinstatement was because of the inconvenience the strikers created by the strike.

Gaskin was asked during cross-examination whether there were any reasons other than "misconduct" for the Respondent's

<sup>70</sup> While the Respondent asserted that shutting the boiler down was misconduct for which the strikers were denied reinstatement, the Respondent also admitted that only Angel Venzen shut off the boiler.

<sup>71</sup> The other incidents of "serious misconduct" documented in security officers reports, and which were included in the Respondent's decision to terminate the employees included: Strike guard S/O Watkins: 7:42 a.m.—Theo walked by building going to DeKalb side. 7:44 a.m.—Theo walked by building going to Lafayette side; February 25, 1999: 8:50 a.m.—Theo walk [sic] across from DeKalb to Lafayette Avenue with strike sign in his hand. He stop in front of building to talk to home attendant that was entering the building. I told him he needed to move on and he did. 3:26 p.m.—Keith walk through the driveway at this time from DeKalb to Lafayette.

<sup>72</sup> Gaskin testified that it was only Angel Venzen that the Respondent held responsible for shutting off the boiler.

<sup>73</sup> Gaskin testified that the board of directors said that Theo and Keith blocked the oil delivery.

<sup>74</sup> Gaskin testified that "they said it had to be Angel . . . just Angel" that was responsible for the problem in the laundry room. Gaskin further admitted that the Respondent had no witnesses and no proof that it was Angel Venzen who caused the drain backup. The board of directors "just assumed" that Angel was responsible.

refusal to reinstate the striking employees. Gaskin did not mention that Respondent believed that the strike was unlawful.

### 36. Credibility

As to the credibility of the respective parties witnesses, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Gold Standard Enterprises*, 259 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); and *Northridge Knitting Mills*, 223 NLRB 230 (1976). From the above, I tend to credit the account of what occurred as given by the General Counsel's witnesses. Although I did note some inconsistencies in the record, their testimony was generally given in a forthright and believable manner, was consistent and corroborative of each other on critical issues and with the other evidence in the record, and discrepancies in their testimony was sought to be explained in an apparent truthful and reasonable manner. Further, based upon their demeanor, and other facts in the record I find these witnesses to be more trustworthy and credible.

In contrast, the testimony of the Respondent's key witnesses, Eunice Johnson, Valerie Brooks, and Kevin McGill was evasive, guarded, and inconsistent of other evidence in the record, and interestingly, in some instances supportive of the testimony of the General Counsel's witnesses. Their demeanor was uncooperative at times giving unresponsive answers and their testimony contradicted each other and that of other of the Respondent's witnesses. For example, Gaskin testified that the employees were told that they had to get a letter from the Union wherein the Union disavowed interest in representing them in order for reinstatement, while Johnson recalled that this was not a precondition to reinstatement.

Additionally, Eunice Johnson testified that if her voice had been recorded on tape and this was contradicted by her testimony, that the tape was more reliable. If there was a writing that contradicted the testimony, Johnson stated that the writing would be more credible than the testimony, but less credible than the tape recording. Johnson conceded that her own testimony, was the least credible source of the truth. Also McGill testified that he recommended, at the beginning of the meeting, that the Respondent take the striking employees back. Yet the minutes of that meeting make no reference to any recommendation by McGill as such. McGill admitted that there was no statement by him, recorded in the minutes of that meeting recommending that the strikers be reinstated.

Moreover, while I do not discredit all of the testimony of these witnesses where it does not conflict with that of the General Counsel's witnesses, based upon their demeanor, I additionally found their testimony to be vague, less than credible, not believable and they especially proved to be suspect as unreliable witnesses, changing their testimony when confronted with evidence to the contrary. Of additional significance is the failure of the Respondent to call Chantel Bennett, security officer "Pat," and the Roto-Rooter man as witnesses without explanation to corroborate, clarify, or rebut any of the testimony

given. Since their testimony was not elicited, it is presumed that it would not support the contentions of the Respondent.<sup>75</sup>

### B. Analysis and Conclusion

The consolidated complaint alleges that the Respondent in March 1999, refused to reinstate its unit employees after they, and also the Union on their behalf, made unconditional offers to return to their former positions unless and until these employees abandoned their support for the Union, the Respondent thereby discriminating against them in regard to the hire and tenure and terms and conditions of employment, and thus discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act. The consolidated complaint also alleged that the Respondent engaged in such conduct because its employees joined, supported, or assisted the Union, and in order to discourage its employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

On February 22, 1999, six of the Respondent's maintenance employees, Curtis Bailey, Theorgy Brailsford, Lawrence Folkes, Jude Obaseki, Keith Robinson, and Angel Venzen, engaged in a strike and commenced picketing in support of the Union's demand for a collective-bargaining agreement. The record evidence shows that on March 11 and 15, 1999, all these six striking employees made unconditional offers to return to work. Moreover, the parties stipulated that the Respondent did not permanently replace the strikers. An economic strike is protected activity and strikers retain the status of employees. Although an employer may permanently replace strikers with others in an effort to carry on its business, any discrimination in putting the strikers back to work is a violation of Section 8 of the Act. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 346-347 (1938).

The respective rights of economic strikers and thus employees are well established. As the Supreme Court stated in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967):

Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justification," he is guilty of an unfair labor practice. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. *Ibid*. It is the primary responsibility of the Board and not of the courts "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *Id.*, at 33-34.

<sup>75</sup> An adverse inference may properly be drawn regarding any matter about which a witness is likely to have knowledge, if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party. *Hudson Moving & Storage Co.*, 322 NLRB 1028 (1997); *Redwood Empire*, 296 NLRB 369, 384 fn. 83 (1988). Contrast, *Goldsmith Motors Corp.*, 310 NLRB 1279 fn. 1 (1993); *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987), *enfd.* 863 F.2d 964 (D.C. Cir. 1988).

Also, from the failure of a party to produce material witnesses or relevant evidence without satisfactory explanation, the trier of the facts may draw an inference that such testimony or evidence would be unfavorable to that party. *Eleven Food Store*, 257 NLRB 108 (1981); *Publishers Printing Co.*, 233 NLRB 1070 (1977).

In some situations, “legitimate and substantial business justifications” for refusing to reinstate striking employees who engaged in an economic strike, have been recognized . . . *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938).<sup>76</sup>

Further, in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the Supreme Court held that proof of antiunion motivation is unnecessary when the employer’s conduct “could have adversely affected employee rights to some extent,” and when the employer does not meet his burden of establishing “that it was motivated by legitimate objectives.” 388 U.S. at 34.

It is unlawful for an employer to condition the reinstatement of strikers upon their abandoning a union, and to require strikers to furnish proof that they have resigned from the union in order to return to work. *F. L. Thorpe & Co.*, 315 NLRB 147 (1994); *Gaywood Mfg. Co.*, 299 NLRB 697 (1990); and *Triumph Curing Center*, 222 NLRB 627 (1976).

The record evidence establishes that the Respondent unlawfully conditioned the strikers’ reinstatement upon their abandoning the Union, and providing the Respondent with written proof by letter that all ties with the Union had been severed and the Union no longer represented them. It is undisputed that all six strikers made unconditional offers to return to work on March 11 and 15, 1999, and that the Union made an unconditional offer to return to work on behalf of the employees on March 16, 1999. It is also undisputed that the Respondent never replaced the strikers with permanent employees, but only with temporary employees.

The credited testimony of Theo Brailsford and Keith Robinson, and the affidavit of Curtis Bailey shows that on March 11, Eunice Johnson told these employees after they had made unconditional offers to return to work, that in order to be considered for reinstatement they had to get a letter from the Union stating that they no longer were represented by 32B-32J. Seeking an explanation for the Respondent’s demand Brailsford repeatedly asked Johnson why such a letter was required and if the employees could return to work without the letter. Johnson’s response was, “No.”

The credible and corroborative evidence also establishes that on March 15, 1999, when Angel Venzon and George Folkes made unconditional offers to return to work, Valerie Brooks told them that they had to obtain letters from the Union stating that they no longer wanted the Union and were no longer in the Union. Additionally, on March 15, when Jude Obaseki made an unconditional offer to return to work during a telephone conversation with Brooks, she informed him that he had to disassociate himself from the Union before he could come back to work.

Furthermore, the testimony of the Respondent’s own witnesses establishes that the Respondent required that the striking employees abandon the Union and produce evidence of this in the form of a letter from the Union stating that the Union no longer represented them before they would be reinstated. Fayette Gaskin testified that during the March 11 and 15 meetings,

Johnson told the employees that she would need verification by letter from Local 32B-32J that the employees were no longer connected to the Union, and until such a letter was produced there was nothing she could do about reinstating them. Gaskin implied in her testimony that the failure of the men to produce such a letter was the reason why the Respondent did not reinstate them. Moreover, Joan Newsome-White testified that Johnson requested that the employees obtain a letter from the Union stating that the men no longer wanted Local 32B-32J to represent them, and Eunice Johnson admitted that she told the employees that they needed a letter from the Union stating that these employees had severed their ties with the Union.

However, the Respondent asserts that the reason it told the employees to obtain a letter from the Union indicating that they had severed their ties with it was because the employees had come to the Respondent not only seeking their jobs back, but because they wanted the Respondent’s assistance in getting a new union since they were unhappy with Local 32B-32J’s representation of them in the negotiations and the resulting strike. It should be noted that I do not credit the Respondent’s assertion or its rendition of what occurred at the March 11 and 15 meetings with the striking employees, and its purported reasons for the demand that the striking employees disassociate themselves from the Union with proof thereof. First as noted in the “Credibility” section of this decision. I credited the testimony of the General Counsel’s witnesses over that of the Respondent’s, and the striking employees all testified that they never told the Respondent that they were unhappy with the Union and no longer wanted to be represented by the Union. As testified to credibly by the General Counsel’s witnesses, it was the Respondent who raised the issue of the Union in requiring the employees to get letters from the Union indicating that they were no longer connected to it, when the striking employees requested their jobs back. It is apparent from the record evidence that the actual reason the Respondent sought such letters from the Union by the employees was because it was fully aware of its obligation, under the Board’s certification of Local 32B-32J as the bargaining representative of its employees, to bargain with that Union, and it wanted to get out from under the certification any way it could, and not for the reason that the striking employees no longer wanted the Union to represent them, as alleged.

Furthermore, the Respondent’s contention that the employees sought to get rid of the Union was not supported by any credible, probative evidence. Instead, the Respondent’s witnesses’ presented only self-serving testimony to support its defense. The Board does not treat self-serving testimony as conclusive, even where it is uncontradicted, and here the Respondent’s witnesses’ testimony was controverted by that given credibly by the General Counsel’s witnesses. *Twin Cities Electronics*, 296 NLRB 1014 (1989).

Moreover, the employees’ testimony is supported by additional probative evidence. The record shows that the employees, having been dissatisfied with their former Union Local 2, elected Local 32B-32J as their bargaining representative through the auspices of an NLRB conducted representation election. Thus, the evidence shows that the employees were

<sup>76</sup> Also see; *Laidlaw Corp.*, 171 NLRB 1366 (1968); *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385 (D.C. Cir. 1995); and *NLRB v. Fire Alert Co.*, 566 F.2d 696 (10th Cir. 1977).

aware, without the Respondent's assistance, at least what to do when unhappy with their Union.

Also, the testimony of Board Agent Sharon Chau, given in a highly forthright, credible, and believable manner, and without any reason to be less than impartial or to embellish her testimony, establishes that on March 11, 1999, the employees came to the Board immediately after being denied reinstatement, and told Chau that the Respondent had demanded a letter from the Union stating that it no longer represented the employees. Chau telephoned the Respondent on behalf of the employees and spoke to McGill, the Respondent's counsel. McGill admitted though seemingly reluctantly that Chau informed him that the Respondent required such a letter from the Union in order for the employees to return to work.

Additionally, not only is the Respondent's defense not believable; it is unavailing. The Respondent's allegation that the employees sought to get rid of the Union is no defense. Even assuming arguendo the Respondent's version, the testimony of the Respondent's witnesses establishes that the Respondent still conditioned reinstatement upon the employees *proving* that they resigned from and severed all ties with the Union in order to be reinstated. Eunice Johnson testified that she told the employees that she could not take their word that they no longer wanted Local 32B-32J. She testified that she needed *proof*, in the form of a letter from the Union, that the employees had severed their ties with the Union in order to return to work. Thus, even if it is concluded that the employees wanted to abandon the Union, the Respondent's conduct requiring the employees to return with written proof—does not provide the basis for a different result. Reinstatement and who will represent the employees are two separate and distinct issues. The evidence conclusively establishes that it was the Respondent who, unlawfully, linked the two.

For the above reasons, the clear and convincing evidence establishes that the Respondent conditioned the striking employees' reinstatement upon their abandoning the Union and furnishing proof that they severed all ties with the Union. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act.

#### 1. The Respondent's affirmative defenses

Board law is clear that after the striking employees, who have not been permanently replaced, make unconditional offers to return to work, the Respondent is obligated to immediately reinstate them. *NLRB v. Mackay Radio & Telegraph Co.*, supra; *Gimrock Construction*, 326 NLRB 401(1998).

The Respondent raises two affirmative defenses for its denying the striking employees reinstatement upon their unconditional request for their jobs back. (1) the alleged misconduct of the striking employees and (2) the unlawfulness of the strike itself.

#### 2. The alleged striker misconduct

In cases involving either the discharge of or refusal to reinstate strikers for having engaged in alleged acts of strike misconduct, "the burden of proving discrimination is that of the General Counsel." *Rubin Bros. Footwear*, 99 NLRB 610, 611

(1952). In *Virginia Mfg. Co.*, 310 NLRB 1261, 1271 (1993), the administrative law judge with Board approval, stated:

But action taken against participants of a protected strike is inherently destructive of Section 7 rights. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Accordingly, the General Counsel's threshold burden is to establish (1) that a worker was, in fact, a striker and (2) that his employer took some action against him for conduct associated with the strike. *Laredo Coca Cola Bottling Co.*, 258 NLRB 491, 496 (1981).

Thus, the General Counsel carries out its burden of establishing a prima facie case by demonstrating that (1) the unreinstated employee had been a striker and (2) the employer refused to reinstate the striker on the ground that he engaged in strike misconduct. *Virginia Mfg. Co.*, supra at 1271, and cases cited therein. It is undisputed and the parties stipulated that all six employees involved were strikers. The Respondent alleges that it refused to reinstate the strikers because they allegedly engaged in strike misconduct. This is sufficient to find that the General Counsel has established its prima facie case. *General Telephone Co.*, 251 NLRB 737, 739 fn. 18 (1980), enf. mem. 672 F.2d 895 (D.C. Cir. 1981).

Having established prima facie case, the burden shifts to the Respondent to prove that it had an honest belief that the employees were guilty of strike misconduct of a serious nature. *Virginia Mfg. Co.*, supra; *NLRB v. Champ Corp.*, 933 F.2d 688, 700 (9th Cir. 1991); *General Urethane Corp.*, 284 NLRB 1349, 1352 (1987); *General Telephone*, supra at 738. Serious misconduct which disqualifies a striker from reinstatement, or permits his discharge, is that which meets the test set forth by the Board in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enf. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986), "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce, or intimidate employees in the exercise of rights protected under the Act."<sup>77</sup> Moreover, misconduct aimed at managers or other nonemployees may also be grounds for denying reinstatement. *Virginia Mfg. Co.*, supra; *General Chemical Corp.*, 290 NLRB 76, 82 (1988); *Aztec Bus Lines*, 289 NLRB 1021, 1027 (1988); *Clear Pine Mouldings*, supra.

The Respondent's honest belief burden is not satisfied by generalities, and meeting that burden "requires some specificity in the record, linking particular employees to particular allegations of misconduct." *General Telephone*, supra at 739.<sup>78</sup> However, the Respondent need not prove that the strikers did engage in the alleged misconduct in order to satisfy its "honest

<sup>77</sup> *Medité of New Mexico, Inc. v. NLRB*, 72 F.3d 780 (10th Cir. 1995); *Mohawk Liqueur Co.*, 300 NLRB 1075 (1990).

<sup>78</sup> While the Act does not protect striking employees who commit acts of vandalism or sabotage against their employer, to lawfully deny an employee reinstatement at the conclusion of the strike on the grounds of alleged misconduct, the employer "must produce evidence connecting the discharged employees to specific misconduct." *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 257 (6th Cir. 1990); *Augusta Bakery Corp.*, 957 F.2d 1467 (7th Cir. 1992); *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763, 765 (10th Cir. 1982).

belief” burden, nor does it require “a concrete, conclusive linkage.” *Axelsson, Inc.*, 285 NLRB 862, 864 (1987).<sup>79</sup>

Once the Respondent demonstrates its honest belief, the burden shifts back to the General Counsel to prove the discharged striker’s innocence. *Champ Corp.*, 291 NLRB 803, 806 (1988), *enfd.* 933 F.2d 688, 700 (9th Cir. 1991); *Laredo Coca Cola Bottling Co.*, *supra* at 496; *Rubin Bros. Footwear*, *supra* at 611. The Respondent then may offer evidence rebutting the General Counsel’s evidence of innocence. *Laredo Coca Cola Bottling Co.*, *supra*; *Rubin Bros. Footwear*, *supra*.<sup>80</sup> If it is found that the striker did not engage in the misconduct alleged, he or she may not lawfully be discharged regardless of the Respondent’s good faith. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); *NLRB v. Champ Corp.*, 933 F.2d 688, 700 (9th Cir. 1991).

The Respondent maintains that it denied “some of the strikers requests for reinstatement on [its] honest belief that such individuals engaged in serious strike misconduct” and therefore its actions were lawful. *Big Horn Coal Co.*, 309 NLRB 255, 260 (1992). However, the record evidence casts doubt on whether the Respondent actually held such an honest belief. A finding that the Respondent’s defense is a pretext “necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.” *Johnson Freightlines*, 323 NLRB 1213, 1221 (1997), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982). Preliminarily, as revealed in the tape of the Respondent’s March 16, 1999 board of directors’ meeting, the Respondent believed that “if we could prove misconduct on the part of one of the men then that would be grounds to not have to take them back . . .,” and this being said after it was acknowledged that the striking employees had requested their jobs back, the Respondent through Valerie Brooks, its board president stated, “[W]e don’t want that.” At this meeting McGill also told the board of directors that to justify not reinstating the men it would have to present proof of misconduct on the part of the strikers. Moreover, McGill also said that after his interview with security officer Kennedy, the day watchman, he could only tell the board that the men never threatened, nor even harassed the other employees, but merely insulted them. McGill then goes on to instruct the board to find anything that would be of significance to prove that the striking employees committed acts of misconduct.

First it should be noted that Board law holds that where an employer offers shifting defenses, it must provide substantial and convincing evidence to dispel doubt or it is fatal to its defense. *Caguas Asphalt*, 296 NLRB 785 (1989). Additionally, the record evidence shows that each of the Respondent’s witnesses gave contradictory and inconsistent accounts of the alleged striker misconduct that purportedly formed the basis for

the Respondent’s refusal to reinstate the striking employees. For example, Valerie Brooks named eight “incidents” during her direct examination, never stating that these were reasons for the Respondent’s decision. During cross-examination, she named only four incidents. Brooks then related a new reason, one never asserted before, that the Respondent relied on reports by the security officers. She provided no details regarding which security officers the Respondent relied on or the nature of their reports.<sup>81</sup> Brooks noticeably failed to mention shutting off the boiler, which was supposedly one of the more egregious acts of “sabotage” committed by the strikers. It is not believable that Brooks, the president of Respondent’s board, would fail to remember such serious conduct—except for the likelihood that it was not truly relied upon.

Like Brooks, Eunice Johnson testified to “events,” but never directly stating that these incidents were relied upon by the Respondent in denying the strikers reinstatement. On direct examination, Johnson testified to four events. During cross-examination she changed her testimony and contradicted that of Brooks, unequivocally stating that the extra garbage in the compactor room was not a reason that the Respondent “went after” the employees. By her own admission, Johnson rendered irrelevant days of testimony regarding the allegedly horrifying amount of garbage bags on the second day of the strike. Clearly, that the Respondent injected an irrelevant incident into the record compels the conclusion that it was attempting to fabricate its defense.

Faythe Gaskin testified, extremely vaguely, to numerous different reasons the Respondent allegedly relied on, including not letting the oil trucks come in; Venzen bringing his children to their babysitter in Respondent’s facility; UPS drivers not crossing the picket line and the general inconvenience caused to the tenants by the strike. None of the Respondent’s other witnesses testified to these incidents. Gaskin, too, failed to mention many events that were supposed to have been serious acts of misconduct testified to by the other Respondent’s witnesses. Gaskin admitted that other than the various acts of misconduct, the only other reason that the Respondent denied the striker’s reinstatement was because the employees did not furnish it with verification that they were no longer connected to Local 32B-32J.<sup>82</sup>

<sup>79</sup> Moreover, the Respondent’s honest belief may be based on reports from its security guards or on written reports from others. *Clougherty Packing Co.*, 292 NLRB 1139, 1142 (1989); *General Telephone*, *supra* at 739.

<sup>80</sup> It must be remembered that the General Counsel at all times has the overall burden of proving discrimination by a preponderance of the credible evidence. *Champ Corp.*, *supra* at 806, 807 fn. 13; *Axelsson*, *supra* at 864; *Gem Urethane*, *supra* at 1352; *Rubin Bros. Footwear*, *id.*

<sup>81</sup> It is significant that while the Respondent did present security officer Holloway’s testimony, they failed to call other security guards upon whose reports they allegedly relied, to corroborate this crucial element of the Respondent’s defense. Nor did the Respondent explain its failure to call these security officers. Accordingly, an adverse inference must be drawn that had the other security officers testified, they would not have supported the Respondent’s position. *Johnson Freightlines*, 323 NLRB at 1222; *Bay Metal Cabinets*, 302 NLRB 152 (1990), *enfd.* 940 F.2d 661 (6th Cir. 1991); *Redwood Empire, Inc.*, 296 NLRB 369 fn. 1 (1980).

<sup>82</sup> The Respondent’s witnesses’ testimony gives rises to the application of the Board’s longstanding principle that because the Respondent offered shifting and piled-on defenses, it must be concluded that its stated reasons for denying reinstatement are false, and that its true reasons are unlawful ones that the Respondent desires to conceal. *Johnson Freightlines*, *supra*; *10 Ellicott Square Court Corp.*, 320 NLRB (1996); *C. J. Rogers Transfers*, 300 NLRB 1095 (1990).

In addition to the irreconcilable contradictions in the testimony of the Respondent's witnesses and the shifting defenses, the pretextual nature of the reasons for not reinstating the striking employees is demonstrated by the Respondent's failure to adequately or fairly investigate the alleged misconduct. *Johnson Freightlines*, supra at 1222. Under Board law, the Respondent's failure to fairly investigate the alleged misconduct constitutes a significant factor in concluding that the Respondent's proffered reasons for not reinstating the employees was pretext. Id. at 1222; *Doctor's Hospital of Staten Island, Inc.*, 325 NLRB 730 (1998); *Frick Paper Co.*, 319 NLRB 9 (1995); *Emergency One, Inc.*, 306 NLRB 800, 807 (1992). The Board found that a supervisor's failure to investigate the accusation of theft by one employee, known to be antiunion, against another employee who was known to be a leading union adherent, his failure to ask the employee to explain, and his failure to verify the accusations, "reveals an investigation designed not to find out what occurred but rather to support a discharge of [the union adherent]."

The evidence discloses that the Respondent made its determination to deny reinstatement on March 16 during its board of director's meeting, before it had concluded, or perhaps even begun, its alleged misconduct investigation. Eunice Johnson admitted several times that the Respondent decided not to take the strikers back on March 16th before it had concluded its "investigation" into the alleged misconduct. The tape of the March 16th meeting conclusively reveals that the Respondent decided to deny reinstatement before the return of Security Officer Pat, who it believed, had critical information regarding alleged misconduct. Furthermore, each of the Respondent's witnesses, along with the employees themselves, admitted that the Respondent did not contact any of the striking employees to inform them of the accusations against them, to ask questions about any incidents, or to give them the opportunity to present a defense. Such an unfair, incomplete investigation evidences pretext, not honest belief. *Frick Paper Co.*, supra. Clearly, such an "investigation" was not designed to ascertain the truth, but to support or manufacture the termination of the striking employees.

The Respondent argues, that it did not decide to deny reinstatement on March 16, but that the decision was made on March 23, and that this contention is supported because the Respondent sent its letter of termination on March 24. However, the record evidence does not support this contention; that the Respondent decided to deny reinstatement on March 16, is further established by the Respondent's admissions that after March 16 and before the March 23 board meeting, Eunice Johnson asked McGill to prepare a draft letter, for the board's approval, stating that the board voted to deny the strikers reinstatement. The Respondent admits that it did not ask for, nor did McGill prepare, an alternative "draft" letter granting the employees' request to return to work. Thus, despite the Respondent's assertion that it decided to deny reinstatement on March 23, the evidence shows otherwise.

The record evidence makes it clear that the Respondent's explanations for denying the strikers reinstatement are pretextual. They either do not exist, were fabricated or were not, in fact, relied upon. Therefore, under Board law, the Respondent "will

not have met its burden and the inquiry is logically at an end." *Weis Markets, Inc.*, 325 NLRB 871, 892 (1998). As the Respondent's defense is pretext, the Respondent has failed to establish that it had an honest belief that the strikers engaged in serious misconduct.

Not only did the Respondent not establish an honest belief that any strikers engaged in any misconduct, of a serious enough nature to preclude reinstatement, the record evidence, including admissions by the Respondent's own witnesses, reveals that the Respondent knew that most of the employees engaged in no misconduct, at all. Yet, the Respondent denied their reinstatement anyway, without explanation. In addition, the Respondent failed to establish with any credible, probative evidence, that the remaining employees either engaged in the conduct of which they were accused, or that any of the purported misconduct was serious in nature. Importantly, the Respondent's witnesses unequivocally admitted that striking employees Curtis Bailey, George Folkes, and Jude Obaseki did not commit any acts of misconduct at all. This admission not only warrants, but compels the conclusion that the Respondent's defense of serious misconduct on the part of the strikers was pretextual. It also gives rise to the inference that the Respondent's witnesses willingly gave untrue testimony in regard to Bailey, Folkes, and Obaseki constituting unsubstantial allegations based upon what I perceive as suggestive testimony, vague insinuation and innuendo against employees whom it knew committed no acts of misconduct, in order to support its defense.

As the record evidence establishes most of the alleged acts of general misconduct have not been specifically connected to the discharged striking employees. The Respondent admitted that it had no evidence that any of the strikers were involved in the alleged misconduct of sabotaging the laundry room drains. No one saw any of the strikers placing "cement" in the drains. In fact the Roto-Rooter workmen who fixed the clogged drain found a heavy build up of lint and rocks in the pipes causing the overflow and not cement.

After accusing the strikers of jamming the lock on the outer parameter gate of the building the Respondent admitted that it had no evidence that any of the strikers were involved and had no idea who might have done this. With regard to the incident of the air being let out of Brook's tires, again there were no witnesses to the incident yet the Respondent blamed the striking employees for this. Thus, there is no evidence in the record that any one of the striking employees tampered with the lock or the tires. The Respondent also asserted that the striker's committed acts of misconduct by using the walkway between DeKalb and Lafayette Avenues. However, the evidence shows that the Respondent allowed nonresidents to use the walkway as a shortcut, so people did not have to walk around the entire building. Furthermore, the Respondent admitted that it never advised the employees that they were not to use the walkway.

There is much conflicting testimony regarding alleged misconduct and harassment concerning garbage collection during the strike. The Respondent held the strikers responsible for the Department of Sanitation refusing to cross the picket line. This contention is not supported by the evidence in the record. The strikers could not be responsible for the DOS policy not to

cross picket lines without the issuance of a health order and the Respondent knew of this policy even before the advent of the strike. Moreover, the Respondent failed to produce Security Office Pat or a Department of Sanitation representative that the Respondent allegedly spoke to or relied upon in concluding that the striking employees caused DOS not to pick up the trash.<sup>83</sup>

The Respondent also accused the striking employees of throwing garbage about the Respondent's premises but could not substantiate this allegation. The Respondent admitted that it had no idea as to who had done this as no one witnessed any of the strikers doing it. In fact, the record shows that on one occasion, an intoxicated visitor was observed overturning garbage cans on the premises on February 24, 1999. Additionally, the Respondent accused the strikers of responsibility for the accumulation of extra bags of garbage in the trash compactor room on the second day of the strike. But the strikers had not been in the building since Monday, February 22. Over 500 tenants, who live in the building continued to generate trash after the strike began. It is reasonable to assume the extra bags of trash accumulated was due to the Respondent's closing down the trash compactor according to its strike plan and not any of the strikers.

With Eunice Johnson finally and unequivocally testifying that the Respondent had no proof that three of the six striking employees, Curtis Bailey, Lawrence Folkes, and Jude Obaseki, had engaged in any misconduct whatsoever, that leaves consideration of the alleged misconduct of employees Angel Venzen, Theo Brailsford, and Keith Robinson to consider.

In *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941), the Supreme Court noted that during strikes, employees sometimes engage in "moments of animal exuberance." Thus name calling, minor threats, mass picketing, and the like are generally not deemed sufficient to deny employees their statutory protection. However, when the striker has stepped over the line and engaged in threats of physical violence, actual physical violence or property damage such has a coercive affect on the rights of other employees. The individual involved in such conduct may be deemed unfit for further employment and be denied reinstatement.

In order to meet the standard set forth in *Clear Pine Moulding*, supra, an employer must offer proof by objective evidence that the verbal misconduct, for instance, meets the test. See for example, *Buffalo Concrete*, 276 NLRB 839 (1985). Totally benign behavior is not required on the picket line. However where strikers physically assault others or threaten to do so when the threat has the immediacy of reality, or when they engage in property damage, then such is sufficient to justify the

employer denying them reinstatement. Each case must be separately considered on its own facts.

### 3. Angel Venzen

After the vague, unsubstantiated accusations against all strikers are set aside, the Respondent contends that it refused to reinstate Angel Venzen because he shut off the boiler. The evidence shows that the boiler incident, which has been attributed to Venzen, was not an incident of misconduct at all. Moreover, the Respondent failed to satisfy its burden that it had an honest belief that Venzen had engaged in serious misconduct.

The Respondent denies that Venzen told Eunice Johnson that he was shutting off the boiler before going on strike. Because of the crucial nature of Johnson's testimony, it is extremely significant that the Respondent failed to call Chantel Bennett, Johnson's then and current secretary, to testify on the matter. An adverse inference must be drawn that Bennett would have corroborated Venzen's testimony and not Johnson's. *Bay Metal Cabinets, Inc.*, supra. The Respondent did not explain its failure to call Bennett, nor did it contend that she was not available to testify. To the contrary, Johnson admitted that the Respondent had notified Bennett that the Respondent might call her as a witness.

The record demonstrates that the Respondent failed to conduct a fair investigation regarding the allegation that Venzen shut down the boiler as an act of sabotage. The Respondent admitted that shutting off the boiler would have been less serious had Venzen notified the Respondent in advance. And yet, the Respondent admitted that it never considered the possibility that Chantel Bennett forgot to tell Johnson that she had been so notified by Venzen.

The Respondent did know, based on the employees' memo to shareholders in response to the Respondent's allegations against them, that the employees asserted that they turned off the boiler in accordance with the Union's instructions and as a safety precaution. Nevertheless, the Respondent completely ignored this explanation. The Respondent never asked Venzen about the event and failed to allow him to present his defense. Venzen as he testified, would have told the Respondent that he had shut off the boiler, pursuant to instructions from the Union, to protect the safety of the Respondent's property and the tenants. All of these factors support the conclusion that the Respondent's defense is a pretext.

Furthermore, the evidence demonstrates that shutting off the boiler was not as serious as the Respondent would have it believed. First, the boiler was turned on by 7:30 that evening, and the Respondent admitted that it was not that cold yet in the building. In addition, although the Respondent's counsel knew that Venzen shut off the boiler as of March 9, McGill testified that he recommended to his client that it reinstate the strikers. Thus, having shut off the boiler could not have been the serious infraction the Respondent states it was.<sup>84</sup> Moreover, the Re-

<sup>83</sup> The failure to produce these witnesses gives rise to the inference that their testimony if given would not have supported the Respondent's position. *Johnson Freightlines*, supra; *Bay Metal Cabinet*, supra, *Redwood Empire, Inc.*, supra.

I am aware of security officer Holloway's testimony regarding certain incidents involving the first days of the strike wherein he observed nonemployee pickets threatening temporary employees putting out garbage and another incident where a red jeep supposedly driven by Theo Brailsford blocked a garbage truck. More about this appears hereinafter.

<sup>84</sup> The Respondent contends that, "Shutting off the boiler on a freezing cold winter day without more, constitutes serious misconduct.<sup>19</sup> Elderly residents could have died as a result of this reckless act."

spondent also admitted this alleged misconduct was an insufficient basis upon which to deny reinstatement. Finally, even if Venzen shut off the boiler without notifying the Respondent, such misconduct is not of the sort that would have coerced or intimidated employees so as to lose protection under the Act.

#### 4. Theo Brailsford

Aside from the unsubstantiated accusations against the strikers, in general the Respondent appears to contend that Theo Brailsford was denied reinstatement because he blocked removal of trash on February 23 the second day of the strike. Johnson claimed that because of this disruption, she had to devise a plan by which the replacement workers took the garbage to the gate, and tenants took the trash to the curb. The Respondent's assertion is also without merit and is not borne out by the record evidence.

The evidence establishes that on the second day of the strike, when the replacement workers began to take out the trash, the strikers, including Brailsford, tried to inform the replacements about the strike and enlist their support or sympathy. Brailsford said words to the effect that the employees were on strike, and that the replacements were taking their jobs. At the end of their conversation, the replacement workers agreed not to take the trash to the curb. Contrary to Johnson's testimony that she devised this plan because of a problem created by Brailsford, the Respondent's January 1999 strike contingency plan reveals that the Respondent had previously conceived the plan.

Again, even if true, the Respondent failed to prove that such conduct was serious enough to remove Brailsford from the protection of the Act. Johnson admitted the trash got put out that day. Furthermore, Johnson admitted that apart from this one brief incident, the Respondent had no further problems putting the trash out.<sup>85</sup> In fact, the Respondent admitted that this alleged "misconduct" was an insufficient basis upon which to deny reinstatement.

#### 5. Keith Robinson

The Respondent appears to contend that Keith Robinson was denied reinstatement because he harassed and threatened the replacement workers. Again, this contention is without merit and does not withstand scrutiny.

<sup>19</sup> There should be no question about the strikers' or Gross' motivation in shutting down the boiler. It was to freeze the residents of the building into submission. They immediately set up a picket line around the building with the stated object of keeping contractors and suppliers out of the premises. Having inflicted this act of sabotage, they purposefully set out to prevent Pratt's boiler maintenance company—or anyone else—from coming to the aid of the building's inhabitants. Gross admitted as much (CA Tr. 989). It is false for the Union to suggest that shutting down the boiler was for safety reasons.

However, the evidence does not support the Respondent's contention in any way. Moreover, Gross only admitted that the picket line objective is to keep contractors, and suppliers, and anyone else from crossing the picket line, which they could do anyway if they wanted not to honor it.

<sup>85</sup> The incident involving tenant Rita Bryant and Brailsford, even if true, does not appear serious enough to constitute misconduct sufficient to deny Brailsford reinstatement.

The Respondent called as its witnesses temporary replacement workers Anibal Soriano and Daryl Thomas-Bennett to testify about Robinson's alleged misconduct. As found hereinbefore their testimony is suspect. First, the Respondent failed to give these witnesses the assurances required under *Johnnie's Poultry*, supra, when interrogating them in preparation for the trial. The Board is very strict in this requirement, for it is the only safeguard against coerced testimony. The evidence shows that the interrogations were held in a coercive atmosphere, with, Johnson the person who hired them, present. Additionally, Thomas-Bennett testified in a belligerent and combative manner. Moreover, Soriano's testimony was unreliably devoid of details. He testified that he did not even know if the persons he saw at the facility were even employees of the Respondent.<sup>86</sup> Finally, the witnesses are biased. They know that they will lose their jobs if the strikers are reinstated.

Thomas-Bennett testified that Robinson left the picket line and brought two neighborhood men back who threatened him. Thomas-Bennett also testified that during this time, he went inside the building. Therefore, his claim to have seen Robinson get two "thugs" is not substantiated. The evidence establishes that employees of other buildings joined the picket line to support the strikers. Thomas-Bennett admitted that it was two men who were not Pratt employees who threatened him with harm, and that Robinson said and did nothing.

Again, the evidence shows that if anything occurred, it was not as serious as the Respondent indicates. Thomas-Bennett testified that during his last conversation with Robinson and Brailsford, the strikers said that there were no hard feelings, that they had no problem with him, and that Robinson and Brailsford were trying to make peace with him.

Security Officer Holloway initially testified regarding this purported incident that Robinson brought two guys to the building who threatened the replacements. During cross-examination, Holloway testified that there was a shouting match, with obscenities, between Thomas-Bennett and the two unnamed persons during which Holloway heard, "I'll kick your ass," but he admitted that he did not know who said it, because he was not concentrating then and not listening to the back and forth of the conversation.<sup>87</sup> In addition, Holloway admitted that he does not know the context in which the words were said, nor does he know if Thomas-Bennett provoked the others.

The temporary replacement workers' testimony further establishes conclusively that the accusation against Robinson was also pretext. They testified that they had not been questioned

<sup>86</sup> Soriano also testified about his car window having been broken and tools from his car stolen. This was yet another of the unsubstantiated accusations against the striking employees. Soriano parked his car in what he acknowledged was not the greatest neighborhood. Anyone could drive or walk by. Soriano admitted that he did not see who broke into his car, and that he had no idea who did it. Thus, he demonstrated yet another reason why his testimony should be discounted.

<sup>87</sup> Holloway admitted that on the incident report he completed, he did not record what the temporary employees said during the argument. Thomas-Bennett also testified that Robinson told Chantel Bennett, in his presence, that if he kept "coming around he would get "fucked up." However, the Respondent never called Chantel Bennett as a witness to corroborate his testimony.

by the Respondent about the things they testified to until 1 week before the trial. Therefore, it must be concluded that the Respondent did not rely on their account of these purported events in determining not to reinstate Robinson.

In contrast to the incredible testimony of the replacement workers, I credit Keith Robinson's testimony. He testified in a forthright, detailed, and sincere manner. Robinson denies that he left the picket line, solicited two persons to join him, or that he ever threatened the replacements, or anyone, with physical harm. Additionally, Robinson also denied that he ever used a jeep to block a DOS garbage truck from picking up the Respondent's truck.

From all of the above, and should the Respondent fail to carry its burden of proving its other affirmative defense that the strike was illegal and therefore the Respondent did not have to reinstate the striking employees, I would find that the Respondent violated Section 8(a)(1) and (3) of the Act, and that all six striking employees who sought reinstatement should be returned to their jobs.

#### 6. The legality of the strike

The Respondent argues that it also denied reinstatement to the striking employees because, the Union conditioned the reaching of an agreement upon nonmandatory or unlawful provisions, therefore the strike was unprotected. However the record evidence does not support this contention.

As found by me above, the Respondent made its determination to deny reinstatement to the striking employees on March 16, 1999. As of this time, the Respondent had not raised or discussed the idea of the possibility that the strike was unlawful. In fact, Kevin McGill testified that until March 18 or 19, when he first reviewed the independent apartment house agreement, had he realized that the strike might possibly be unprotected. The evidence establishes that some time after March 23, Eunice Johnson requested that McGill prepare and send a draft letter from the Respondent to the striking employees denying them reinstatement. The Respondent admitted that the board of directors did not learn that McGill now raised the possibility that the strike was illegal until March 23. This, it is evident that the decision to terminate the employees preceded the board learning about possible illegality of the strike, and therefore not relied on in their deciding to deny reinstatement.

It appears from the record that the Respondent may have believed that the claim of "striker misconduct" was an insufficient basis upon which to deny reinstatement. It cannot be more clear that, having determined that it did not want the strikers back and that it would deny reinstatement, if it could and knowing that its claim of misconduct was unsure, the Respondent and its counsel searched for another reason to accomplish this, that reason now being the unlawfulness of the strike.

It is undisputed, that on October 8, 1998, the Respondent proposed to the Union the independent apartment house agreement, with nine proposed modifications. Thus, the record establishes that the Respondent agreed to all terms in the independent agreement, except for the nine items indicated in the October 8 letter.

It is undisputed, and the Respondent admits, that neither the Respondent, nor the Union, raised the subject of the picket line

clause in the independent agreement during the entire course of negotiations. The Respondent did not raise the issue of the union security clause, in particular the question of its legality, during negotiations, other than in McGill's October 8 letter.<sup>88</sup>

It is undisputed that at no time during the negotiations did the Respondent assert that the evergreen clause was in any way unlawful nor that article 4 of the independent agreement (the strikes or lockouts provision) was illegal. In fact, there was no discussion at all about that provision during contract negotiations. At no time during negotiations did the Respondent raise the issue that article 7 of the independent agreement (the subcontracting clause) was illegal.

Sturm's unrebutted testimony establishes that it was not an object of the Union's strike to obtain the picketing clause or subcontracting clause. According to Sturm's credible testimony, the purpose of the strike was to achieve agreement on the issues that were in dispute, which were the effective date of contract, wages, and the date of implementation of any wage increases, whether and when the Respondent would contribute to the Union's funds, the length of the contract, whether the contract would include the evergreen clause and whether it would coincide with the independent agreement or be for 3 years, as proposed, whether the arbitrator would be the office of the contract arbitrator or Howard Edelman.

Apart from those open issues, by virtue of the Respondent's October 8 letter and the parties conduct during subsequent negotiations, each and every clause in the apartment house agreement was proposed by the Respondent and agreed to by the Union. Furthermore, the record establishes that the Respondent did not raise, and no other issues were discussed, during the negotiation sessions. As the discussions of the contract negotiations herein demonstrates, the Respondent failed to show that the Union conditioned reaching an agreement on any of the provisions that the Respondent complains of, that the strike was motivated by an unlawful object.

When ascertaining if an "object" of a strike is unlawful, the United States Court of Appeals in *Electrical Workers Local 480 v. NLRB*, 413 F.2d 1085 (D.C. Cir. 1969), held:

We agree that it would be impermissible for the Board to conclude from the secondary effect of picketing that it had a secondary object. The two must be kept separate . . . . A secondary effect is but one evidentiary factor which may shed light on the object of the actors.

Thus the fact that a strike occurs is not dispositive of the objects of the strike even if as a consequence of the strike the

<sup>88</sup> Sturm testified that in McGill's October 8 letter, McGill raised the question of whether the union security clause was legal. Sturm stated that he pointed out to the Respondent during negotiations that the second paragraph of that clause provides that in the event the clause is deemed unlawful for some reason, it would be interpreted only in a lawful manner. As Sturm's unrebutted testimony establishes, this was the only time that the issue of the union security clause arose during the entire course of negotiations. Thereafter, it was a nonissue. That the Respondent was satisfied with the Union's response is further evidenced by the undisputed fact that the Respondent never proposed any language of its own to replace the union security clause in the agreement.

Employer may have entered into an agreement that would violate Section 8(e) of the Act. Moreover, in ascertaining the object sought by the strike, it does not matter that the union formulates its objectives as a demand. "The parties well understood what alternative action was expected of the Company as a condition of the cessation of the picketing, without the necessity of formulating the specific demand. Nor is it of any importance that not all the objectives of the picketing were proscribed by Section 8(b)(4)(A)."<sup>89</sup>

The Respondent has alleged that Local 32B-32J violated Section 8(b)(3) and Section 8(b)(4)(ii)(A) of the Act by striking where an object of the strike was to compel the Employer to sign a collective-bargaining agreement containing a picket line clause and other mandatory and non-mandatory clauses which are violative of Section 8(e) of the Act, and therefore the strike was unlawful.

However, in *General Longshore Workers ILA Local 1418 (New Orleans Steamship Association)*, 235 NLRB 161, 169 (1978), in a decision affirmed by the Board, Administrative Law Judge Arthur Leff found:

Contrary to the General Counsel's contention, I find that the record in this case does not support a finding of a violation of Section 8(b)(4)(ii)(A), separate and apart from the violation of Section 8(e) found above. Section 8(b)(4)(ii)(A) to the extent here pertinent makes it an unfair labor practice for a labor organization:

to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is:

(A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by section 8(e).

Unlike Section 8(e) which prohibits *voluntary* agreements, Section 8(b)(4)(ii)(A) requires independent proof that the employer party was restrained and coerced.

Moreover, in *ABC Outdoor Advertising, Inc.*, 169 NLRB 113 (1968), Administrative Law Judge Thomas A. Ricci stated in his decision affirmed by the Board:

In support of its argument that Local 770 was striking unlawfully on April 24, the Respondent rests primarily upon those Board decisions holding that a union may not strike or picket to force the employer to agree to a written hot cargo contract provision. I cannot find on the record here that this was the purpose of the strike; the true objectives could as well have been the many company demands from which the Union had refused to recede . . . . This is supporting indication that the real disagreement which provoked the strike was a matter of money . . . . No precedent has been cited for a proposition of law that whenever a union, at any stage of bargaining negotiations, requests an unlawful hot cargo clause, any strike which follows is illegal regardless of how the respective posi-

tions of the parties may have changed in the intervening period, and I do not believe this to be the law.<sup>90</sup>

In the instant case I cannot find that on the record the purpose of the strike was to compel the Respondent to agree to the picket line clause or any other illegal clause in the independent agreement, as a major objective thereof, or as it seems to me even one of the apparent objectives of the strike. The parties each knew full well what the independent agreement contained including the asserted contended clauses and yet most of these clauses were never a topic of discussion or controversy between the parties until the Respondent raised it as an issue after the striking employees sought to return to work and the Respondent filed an unfair labor practice charge with the Board. Additionally, McGill admitted that the areas of contention between the parties were those included in his October 8, 1998 letter to Sturm. The evidence herein shows that these areas in dispute, i.e., wages, benefits, arbitration provisions, and duration of the contract, were economic and the real disagreement that provoked the strike.

There is some Board precedent for finding that strikers who engage in an illegal strike are not protected by the Act. *Mackay Radio & Telegraph Co.*, 96 NLRB 740 (1951). (The Board held that strikers forfeited the protection of the Act by engaging in a strike which was called for the purpose of requiring the employer to agree to an unlawful union-security clause.) However, participation in an unlawful strike does not necessarily terminate the strikers' employment relationship. *Id.* Furthermore, the Board in *Mackay Radio* and subsequent cases has limited its holding to the facts of that case.<sup>91</sup> *Marquette Cement Mfg. Co.*, 219 NLRB 549 (1975).

It is well settled that, having made unconditional offers to return to work, the Respondent was obligated to immediately reinstate the strikers. *Montauk Bus Co.*, 324 NLRB 1128, 1137 (1997). The Respondent's conditioning reinstatement upon abandoning the Union and refusing to reinstate the strikers converted the economic strike into an unfair labor practice strike on March 11 and 15. *F. L. Thorpe & Co.*, 315 NLRB 147 (1994). (The Board found that the employer's statement to strikers that they had to resign from the union before they could return to work converted the economic strike into an unfair labor practice strike.) Thus, even assuming for argument sake that the Union's strike was motivated in part by an unlawful object, the circumstances do not warrant denying the strikers their special reinstatement rights as unfair labor practice strikers. *Colonial Haven Nursing Home, Inc.*, 218 NLRB 1007, 1011 (1975).

<sup>90</sup> Citing *MV Liberator*, 136 NLRB 13, 20 (1962). In that case the Board held:

While one of the original objectives of the picketing was renewal of the Local 33 agreement, which contained an unlawful union-security clause, . . . the record neither shows that Local 33 was adamant in its union-security demand, nor that such demands were at any time a *major objective* of the picketing.

<sup>91</sup> The Board expressly excluded cases involving violence during an otherwise lawful strike from the *Mackay* holding. *Marquette Cement Mfg. Co.*, 219 NLRB at 552. In addition, *Mackay Radio* was not applied where an employer charged that a union struck in violation of Sec. 8(b)(4)(D). *Gimrock Construction*, 326 NLRB 401 (1998).

<sup>89</sup> *ILWU Local 8 (General Ore, Inc.)*, 126 NLRB 172, 173 (1960). Also see *Mine Workers Local 1854 (Amax Coal Co.)*, 238 NLRB 1583, 1587 (1978). "The fact that one of the objectives of the strike was lawful does not, in any way, diminish the fact that the other objective was unlawful."

The General Counsel also asserts that the Respondent condoned any alleged misconduct by the strikers. Under the doctrine of condonation, even strikers engaged in serious misconduct may not be denied reinstatement. *General Electric Co.*, 292 NLRB 843 (1989); *White Oak Coal*, 295 NLRB 567, 570 (1989). Board law provides that,

Condonation of unprotected activity “will not be readily inferred, but must be based on clear, convincing and positive evidence that the employer has agreed to forgive such misconduct and desires to continue the employer—employee relationship as though no misconduct had occurred. The Board does not look for any magic words suggesting the forgiveness, but it examines whether all the circumstances establish clearly and convincingly that the employer has agreed to “wipe the slate clean” respecting any employee misconduct.

*Virginia Mfg. Co.*, 310 NLRB 1261, 1272 (1993).

Offering reinstatement to the accused striker, after the alleged misconduct and before the refusal to recall, condones the alleged misconduct. *White Oak Coal*, supra at 570–571.

General Counsel alleges that the record demonstrates that “the striking employees did not engage in any misconduct and that the Respondent’s defense is pretext. Even assuming that the strikers did engage in misconduct, General Counsel submits that the record establishes that the Respondent condoned any and all striker misconduct.”

The credited testimony of Board Agent Sharon Chau establishes that on March 11, while serving as information officer, she called the Respondent’s counsel, Kevin McGill. Chau informed McGill that when several striking employees made unconditional offers to return to work, Eunice Johnson directed them to produce a letter from Local 32B-32J stating that the Union no longer represented the employees in order to return to work. Chau testified that McGill responded that he had already spoken to Johnson and that the Respondent was prepared to reinstate the employees, that the Respondent needed several days in which to prepare a work schedule, and that the employees would receive a letter the following week regarding their returning to work.

Chau’s testimony is substantiated by the March 11 information inquiry form which according to office procedure, she immediately completed. On the information inquiry form, Chau memorialized her conversation with McGill, including his representation that the Respondent was prepared to reinstate the employees and would notify them of their work schedules the following week.

Kevin McGill testified that he told Chau that he was going to recommend that the Respondent reinstate the strikers. For the reasons set forth in the “Credibility” section of this decision I discredit McGill’s denial that he told Chau that his client was going to reinstate the striking employees. In contrast to the direct and forthright testimony of Chau, McGill’s responses appeared hostile and calculated.

Moreover, Chau’s testimony is supported by the evidence that the employees did not then file an unfair labor practice charge because McGill advised Chau that the Respondent was going to reinstate them.

However, critical to the doctrine of condonation is the assumption that the employer representative who elects to forgive the strikers’ unprotected activity does so with the full knowledge of all the alleged misconduct. *Circuit-Wise, Inc.*, 308 NLRB 1091 (1992). While it appears that the Respondent was aware of some of the alleged acts of misconduct when McGill agreed to “wipe the slate clean” and continue the employment relationship as if no misconduct had occurred, *White Oak Coal*, supra at 570–571, he was not aware of all the acts of alleged misconduct which the Respondent asserts was the basis for denying the striking employees reinstatement subsequently. Therefore I do not agree with the General Counsel that the record establishes clearly and convincingly that the Respondent agreed to “wipe the slate clean” respecting the striking employees alleged misconduct. *Virginia Mfg. Co.*, supra; *Circuit-Wise, Inc.*, supra; *White Oak Coal*, supra.

However, this does not change my finding herein that the Respondent failed to sustain its burden regarding its affirmative defense of alleged employee misconduct, nor that the Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate the striking employees.

From all of the above, I find and conclude that the Respondent’s defenses were either not relied on, pretextual and/or that the Respondent failed to carry its burden of proving its affirmative defenses. Therefore the Respondent violated Section 8(a)(1) and (3) of the Act by failing to reinstate the striking employees.

#### 7. Alleged violation of Section 8(a)(2) of the Act

The amendment to the consolidated complaint alleges that the Respondent violated Section 8(a)(2) of the Act by rendering unlawful assistance to Local 2 by volunteering to recognize Local 2 at a time when the Respondent’s employees were represented by Local 32B-32J.

Section 8(a)(2) of the Act provides that it shall be an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .” A violation can arise from action taken in good faith without any intention of violating the Act. *Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731 (1961). Section 8(a)(2) insures that employees designate a collective-bargaining representative of their own independent choice without interference by the employer, who might prefer dealing with an inside or less aggressive outside labor organization. Employer conduct that actively benefits a preferred outside labor organization over an incumbent<sup>92</sup> or prefers one of two rival outside labor organizations,<sup>93</sup> violates the Act, and generally falls

<sup>92</sup> *Palmos Del Mar Co.*, 277 NLRB 71 (1985), enfd. 797 F.2d 39 (1st Cir. 1986); *Independent Assn. of Steel Fabricators*, 231 NLRB 264 (1977), enfd. denied in part 582 F.2d 135 (2d Cir. 1978), cert. denied 439 U.S. 1130 (1979); *Precision Carpet, Inc.*, 223 NLRB 329 (1976); and *Arkay Packaging Corp.*, 221 NLRB 99 (1975).

<sup>93</sup> *Ralco Sewing Industry*, 243 NLRB 438 (1979); *Ravenwood Electric Corp.*, 232 NLRB 609 (1977); and *Hartz Mountain Corp.*, 228 NLRB 492 (1977).

within the definition of unlawful “assistance.”<sup>94</sup> The Board evaluates the totality of an employer’s conduct in determining whether the “natural tendency of [that] support would be to inhibit employees in their choice of a bargaining representative” and to restrict the employees group in maintaining an arm’s-length relationship with an employer. *Airstream, Inc.*, 288 NLRB 220 (1988).

Soon after the certification of the Union as the bargaining representative of the Respondent’s unit employees, the Respondent started to consider ways of getting rid of the Union.<sup>95</sup> The minutes of the closed meeting of the Respondent’s board of directors’ meeting of August 11, 1998, indicates that Joseph Gaggen, director of management for the management firm (Elm Management) which provides management personnel for the Respondent’s property, told the board that since no agreement as yet had been reached between the Respondent and 32B-32J, the Board certified bargaining representative of the Respondent’s maintenance employees, Gaggen suggested that they keep the employees “out of the Union altogether,” by offering them good salaries and good health benefits, “and you will never have to deal with the Union again.” After Brooks said that the Respondent was legally bound to Local 32B-32J, Gaggen responded that he would speak to a Zabinsky “regarding a non-union.” According to the minutes of the board of directors’ meeting on December 8, 1998, McGill in a telephone conversation, apparently with Eunice Johnson, suggested “that the Board *indirectly* propose to the staff the possibility of going to another Union, such as Local 670.” McGill admitted having made such a suggestion and after a bargaining session with the Union, strongly suggested that the Respondent meet with the employees immediately to discuss the Union and ascertain what they wanted.

Moreover, the tape recording and minutes of the March 16 board of directors’ meeting shows that towards the end of the meeting the Respondent discussed the possibility of getting rid of Local 32B-32J and securing a different union. McGill, at this meeting, stated that the employees can find another union or they can be nonunion. When McGill asked whether Local 2, the employees prior union would be interested in taking them back as members, board of directors’ president, Valerie Brooks, responded that she had spoken to Carlos Stewart, president of Local 2, on the Respondent’s premises who advised her that Local 2 would not take the men back. The Respondent admits that it was totally aware during the above times that “Pratt Towers is committed to Local 32B-32J for a period of one year from the date of the Certification,” when it contacted Local 2.

Therefore, I find and conclude from the above circumstances and the record evidence establishes that the Respondent’s conduct in considering to prolong negotiations for the entire certification year, without reaching an agreement, in approaching Local 2 and soliciting that union to again represent its employ-

ees and in volunteering, in effect, to recognize Local 2, as its employees bargaining representative if Local 2 agreed, and at a time when Local 2 no longer represented its unit employees, and when Local 32B-32J did, enjoying an irrefutable presumption of majority support, that the Respondent rendered unlawful assistance to Local 2 in violation of Section 8(a)(2) of the Act.<sup>96</sup>

---

<sup>96</sup> The Respondent objects to the amendments to the complaint alleging violations of Sec. 8(a)(2), (1), and (5) of the Act as being barred by Sec. 10(b) (6 months statute of limitations) and because there is no supporting charge. The Respondent maintains that “[t]he nature of the 8(a)(2) and (5) allegations could not be more different than the original 8(a)(3) complaint. Nor do the new allegations arise from the same basic fact pattern upon which the 8(a)(3) complaint is predicated. Therefore, these last minute allegations in the form of amendments to the complaint do not relate back to the original complaint.”

I do not agree.

In *Nickles Bakery of Indiana* the Board, citing *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959), held that “Consistent with *Fant Milling*, the Board has long required a sufficient factual relationship between the specific allegations in the charge and the complaint allegations.” In *Redd-I, Inc.*, 290 NLRB 1115 (1988), the Board held that in deciding whether complaint amendments are closely related to charge allegations, it would apply the closely related test, comprised of the following factors. First, the Board will look at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. While this usually may involve the same section of the Act it is not necessary that the same section of the Act be invoked. Second, the Board will look at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board may look at whether a respondent would raise similar defenses to both allegations.

The precedent relied on in *Redd-I* applies a similar closely related requirement to both initial complaints and amendments to complaints. See *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952). *Davis Electrical Constructors*, 291 NLRB 115, 116 fn. 9 (1988); *Whitewood Maintenance Co.*, 292 NLRB 1159, 1169 (1989). Thus, in this case while the same sections of the Act are not involved, the allegations therein satisfy the relatedness requirement because they are predicated on essentially the same legal theory. *Whitewood Maintenance Co.*, supra; *Proctor & Gamble Mfg. Co. v. NLRB*, 658 F.2d 968, 984-985 (4th Cir. 1981), cert. denied 459 U.S. 879 (1982). Moreover, the new allegations clearly arise from the factual circumstances or sequence of events upon which the basic fact pattern of the 8(a)(3) complaint is predicated. And lastly, the Respondent raises similar defenses to both the initial and amended complaints. *Redd-I, Inc.*, supra at 116. Moreover, the record reflects that the Respondent put in its defense to these allegations and refused an offer of an adjournment by the judge in order to meet these new alleged violations of the Act.

As regards its additional defense to the allegation that it violated Sec. 8(a)(2) of the Act, the Respondent in its brief points to the fact that the only contact between Eunice Johnson and Local 2, occurred in August 1998, when she called to inquire about health coverage for the employees, and that she never discussed nor offered to recognize Local 2 on the Respondent’s behalf. The Respondent then asserts that Pratt Towers, through Eunice Johnson did not unlawfully assist Local 2 in violation of Sec. 8(a)(2) of the Act. Even accepting Johnson’s statement as true, it does not affect my finding of a violation of Sec. 8(a)(2) of the Act. As set forth above, there is ample evidence without any reliance on Johnson’s contact with Local 2 to support a conclusion that the Respondent violated Sec. 8(a)(2) of the Act.

---

<sup>94</sup> *Park Inn Home for Adults*, 293 NLRB 1082 (1989); *Systems Management*, 292 NLRB 1078 (1989); *United Artists Communications*, 280 NLRB 1056 (1986); and *Windsor Place Corp.*, 276 NLRB 445 (1985).

<sup>95</sup> At the April 27, 1998 board of directors’ meeting Donohue recommended that the Respondent consider offering the employees another union and dragging out negotiations with Local 32B-32J until the end of the certification year.

8. The alleged violation of Section 8(a)(1) and (5)  
of the Act

The second amendment to the consolidated complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by engaging in a predetermined and planned course of conduct designed to undermine the status of the Union as the exclusive bargaining representative of its unit employees, and to convince them that it would be futile to continue to support the Union and that it would be in their best interests to abandon the Union.

Section 8(a)(5) of the Act establishes a duty between an employer and its employees' bargaining representative "to enter into discussion with an open and fair mind and a sincere purpose to find a basis of agreement." *Houston County Electric Cooperative, Inc.*, 285 NLRB 1213 (1987), citing *Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). Section 8(d) of the Act requires the parties "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . ."

In determining whether an employer has engaged in bad-faith bargaining, the Board examines the totality of the employer's conduct, both away from and at the bargaining table. *Massillon Newspapers*, 319 NLRB 349 (1995), supplemented 320 NLRB 1029 (1996); *Fairhaven Properties*, 314 NLRB 763 (1994); *Coal Age Service Corp.*, 312 NLRB 572 (1993); *Coastal Electric Coop.*, 311 NLRB 1126 (1993); *Optica Lee Boringuen, Inc.*, 307 NLRB 705 (1992). A party remains free to bargain hard, but may not seek to frustrate the bargaining process. *Palace Performing Arts Center*, 312 NLRB 950 (1993); *Reichhold Chemicals, Inc.*, 288 NLRB 69 (1988), *affd.* in pertinent part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990); *J. D. Lunsford Plumbing*, 254 NLRB 1360 (1981); and *West Coast Casket Co.* 192 NLRB 624 (1971).

In ascertaining whether a party has bargained in good faith, making a genuine effort to reach agreement, direct evidence of a party's intent to frustrate the bargaining process is sometimes hard to find. But the employer's intent, after all, is the benchmark determination as to whether an employer is meeting its obligation under the Act and this can be evidenced by the employer's actions both at and away from the bargaining table. In order for nonbargaining misconduct to taint the bargaining process, there must be some nexus between the two, or the misconduct must be of such an egregious nature that only one conclusion can be drawn, that is, that the employer intended to frustrate the bargaining process and not reach an agreement.

The record evidence, including the Respondent's minutes of the board of directors' meetings, internal memoranda, manager's reports, and the cassette tapes of the meetings of March 16 and 23, 1999, clearly indicate that the Respondent engaged in a calculated course of conduct designed "to render contractual agreement an impossibility and to erode support of the Union among employees." *Smyth Mfg. Co.*, 247 NLRB 1139 (1980). It was the Respondent's stated intent to drag out the negotiations until May 1, 1999, when the Union's certification year ended and to undermine and eventually rid itself of the Union. It appears from the record that starting in April 1998, soon after the Union was certified as the bargaining representa-

tive of its maintenance employees, the Respondent considered various options to rid itself of the Union, such as offering the employees better wages and benefits, another union to represent them and the dragging out of negotiations until the end of the certification year.<sup>97</sup> That the Respondent intended to drag out negotiations is established by the record. When the Union modified some of its proposals, made counteroffers, and tried to address most of the Respondent's concerns, the Respondent rejected the Union's offers outright, and raised new and different issues. Moreover, the Respondent made no counterproposals and did not change its proposal from its initial offer. At the board of directors' meeting on October 27, 1998, Brooks informed the board that a strike contingency plan should be prepared "just in case staff chooses to go with the union and there is a strike." But the employees had already "chose to go with the Union" approximately 5 months earlier when they elected Local 32B-32J as their exclusive bargaining representative.

At the board of directors meeting on December 8, 1998, McGill suggested that the board indirectly propose to the staff that they go to another union, such as Local 670. Further, McGill testified that after a bargaining session he strongly suggested that the Respondent meet with the men immediately to bring up the subject of the Union in an attempt to ascertain what they wanted.

McGill spoke during the March 16, 1999 meeting regarding getting rid of the Union on May 1 or 2, stating "[I]f they were to come back to work here, they could get rid of that union on May 1st or May 2nd . . . then they can find another or they can be non-union." At this meeting McGill queried whether or not Local 2, the maintenance employee's prior union would be interested in taking the men back. Whereupon, Brooks stated at the meeting that she had spoken to Carlos Stewart, president of Local 2, concerning whether or not he would take the men back. This meeting between Brooks and Carlos Stewart took place on the premises.

Johnson went even further than Brooks at the March 16, 1999 meeting stating that they are going to prolong and delay the negotiations as much as possible. Johnson also stated that she hoped the men found new jobs during the course of the labor hearing, because then they would not want to come back to the Employer. Brooks then started making plans for running the building with four employees.

Additionally Brooks' statement made during the March 23, 1999 board of directors' meeting is revealing as to the Respondent's position vis-à-vis the Union. Brooks stated:

Because Kevin McGill said there was a possibility that the Union would walk away from that. And I really hope it will

<sup>97</sup> Johnson admitted that at the April 27, 1998 meeting, Donohue told the board that they should consider offering the staff another union and dragging out the negotiations until the end of the certification year. At the board of directors meeting of August 11, 1998, Gaggen who replaced Donohue suggested to the board that they keep the employees out of the Union by offering health benefits and better wages. Gaggen also said he would look into the issue of a nonunion shop.

Moreover, Johnson's own notes of the negotiation sessions illustrates an intent to bargain in bad faith until the anniversary date of the certification.

happen once we start presenting our misconduct. Because they're going to have to—all right, and then once the Union sees, that well, they started out with eight men, one man quit and now they're down to seven men . . . they're legally bound . . . they have to pay for legal representation . . . for these 6 guys who aren't [sic] even long term members . . . like Kevin said, they may walk away . . .

Lastly is the fact that the Respondent demanded that the striking employees discontinue their support and association with the Union before they could be considered for reinstatement to their jobs.

Based upon the record evidence, it is clear that the Respondent did not want Local 32B-32J as its employees collective-bargaining representative because it was too costly. Faced with the Board's certification of the Union as its employees bargaining representative, the Respondent embarked on a plan to rid itself of this Union by engaging in a predetermined course of conduct designed to undermine the status of the Union with the employees. The Respondent never intended to bargain in good faith, dragging out the negotiations until the certification year was up, instigating the employees to consider a different union, requiring them to get letters disassociating themselves from the Union in order for reinstatement and, raising insupportable and even pretextual reasons for denying the men their jobs back in the hope the Union and the striking employees who supported it would "walk away."

The Respondent asserts that it was the Union who bargained in bad faith not the reverse. However, it should be remembered that even if the Union had demanded that the independent agreement be signed "as is," the parties including the Respondent had already agreed during bargaining to those clauses aside from those listed in its October 8 letter, it subsequently after impasse raised as illegal. What does that say as to the good or bad faith bargaining of the Respondent.

From all of the above I find and conclude that the Respondent, by its actions herein, violated Section 8(a)(1) and (5) of the Act.

#### IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

#### V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged striking employees Curtis Bailey, Theogy Brailsford, and Keith Robinson on March 11, 1999, and Angel Venzon, Lawrence Folkes, and Jude Obaseki on March 15, 1999, the Respondent shall be ordered to offer them immediate reinstatement

to their former positions, discharging if necessary any replacements hired since their terminations, and that they be made whole for any loss of earnings or other benefits by reason of the discrimination against them in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1980), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.* 138 NLRB 716 (1962).

As part of the remedy sought, the General Counsel and the Union request an extension of the certification year in which the Respondent is ordered to bargain with the Union upon request, in good faith for "the period required by" *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). The Respondent, in effect, opposes this by asserting that it never failed or refused to bargain in good faith with the Union but that it was the Union who bargained in bad faith.

The Board has long held that where there is a finding that an employer, after a union's certification, has failed or refused to bargain in good faith with that union, the Board's remedy therefore ensures that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned. *Mar-Jac Poultry, Inc.*, supra. Also see *National Medical Hospital of Compton*, 287 NLRB 149 (1987); *Colfor, Inc.*, 282 NLRB 1173 (1987). The measures taken by the Board to assure a period of good faith bargaining generally includes an extension of the certification year for some period of time. *Valley Inventory Service*, 295 NLRB 1163 (1989); *Whisper Soft Mills, Inc.*, 267 NLRB 813 (1983), revd. on other grounds 754 F.2d 1381 (9th Cir. 1984); *Mar-Jac Poultry, Inc.*, supra. However, in some situations, the Board will not extend the certification year, but merely require bargaining on request for a reasonable period of time. *G. J. Aigner Corp.*, 257 NLRB 669 (1981); *San Antonio Portland Cement*, 277 NLRB 309 (1985); *Libby Convalescent Center*, 251 NLRB 817 (1980); *Federal Pacific Electric Co.*, 215 NLRB 861 (1974).

In assessing the appropriate remedy in these situations, it is necessary to "take into account the realities of collective-bargaining negotiations by providing a reasonable period of time in which the Union and the Respondent can resume negotiations and bargain for a contract without unduly saddling the employees with a bargaining representative that they may no longer wish to have represent them." *Colfor*, supra at 1175. Various factors are considered in making such an evaluation, including the nature of the violations found, *Glomac Plastics*, 234 NLRB 1309 (1978); *G. J. Aigner*, supra; *Libby*, supra; the number and extent of collective-bargaining sessions, *G. J. Aigner*, supra; *National Medical*, supra; *Colfor*, supra; the impact of the unfair labor practices upon the bargaining process, *Colfor*, supra; *Valley Inventory*, supra; and the conduct of the Union during the negotiations, *Briarcliff Pavillion*, 260 NLRB 1374 (1982), enf'd. mem. 725 F.2d 669 (3d Cir. 1983).

In evaluating these factors, I conclude that a 1-year extension of the certification year is appropriate to start from the date of resumption of bargaining between the parties. The Union was certified on April 21, 1998. The Union and the Respondent held four bargaining sessions from August 26, 1998, to January 7, 1999. As indicated herein it appears that the Respondent

engaged in bad-faith bargaining intending to draw out the negotiations to allow for the expiration of the certification year and tending to undermine the Union's representational status, while outwardly pretending to negotiate in good faith. Moreover, the Respondent engaged in most egregious unfair labor practices, unlawfully refusing to reinstate and discharging its striking employees, and in seeking and assisting another union to represent its employees in the attempt to rid itself of a lawfully certified but unwanted Union.

The Board has also held that the certification year should be extended in cases in which the employer has engaged in pervasive and extensive illegal practices that commenced at the outset of bargaining, and when the employer has unlawfully encouraged employees to decertify the union. *Frank Leta Honda*, 321 NLRB 482 (1996).

From all of the above, I find and conclude that a 1-year extension of the certification year, will provide the parties with a reasonable period of time for negotiations without unduly saddling the employees with a bargaining representative that they no longer support. *Industrial Chrome Co.*, 306 NLRB 79 fn. 2 (1992); *Den-Tal-Ez, Inc.*, 303 NLRB 968 fn. 2 (1991); *Colfor Inc.*, 282 NLRB 1173 (1987). Moreover, while the certification year will be extended for 1-year, the Respondent's duty to bargain will not necessarily stop when the certification expires. *Colfor, Inc.*, supra, and cases cited therein.

In addition the Respondent will be ordered to resume negotiations with the Union upon request and bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment, and for 1-year thereafter, and if an understanding is reached embody it in a written agreement. *South Carolina Baptist Ministries*, 310 NLRB 156 (1993); *Hydrotherm*, 302 NLRB 990 (1991); *Glomac Plastics*, supra.

Additionally, the Union seeks reimbursement for any expenses incurred as a result of the violations of the Act by the Respondent, "including but not limited to all legal fees incurred by the Union in bargaining and pursuing this claim."<sup>98</sup> The Union asserts that the Respondent "entered into negotiations with a preconceived position to delay, stall, and frustrate the Union, so as to have the ability to cause the employees to decertify the Union after a year of fruitless negotiations."

In *Winn-Dixie Stores, Inc.*, 224 NLRB 1418, 1420-1421 (1976) the Board stated:

In *Hecks, Inc.*, 215 NLRB 765 (1974), the Board reviewed and fully considered the question of the award of litigation expenses and court costs to a charging party. In our decision in *Heck's*, we reaffirmed our position<sup>99</sup> that the award of litigation expenses, except in extraordinary circumstances involving frivolous defenses, would discourage respondents from gaining access to the appropriate forum in order to fully litigate "debatable" defenses.

<sup>99</sup> *Tiidee Products, Inc.*, 194 NLRB 1234, 1236 (1972); 196 NLRB 158 (1972).

<sup>98</sup> The General Counsel did not request such reimbursement here, nor does he take a position on the Union's request for reimbursement of its reasonable litigation and negotiation expenses.

The Union contends that:

Against the background of the Employer's conduct, one can easily conclude that all Union efforts at meeting and negotiating a collective bargaining agreement were for naught. The Employer entered into negotiations with a preconceived position to delay, stall and frustrate the Union, so as to have the ability to cause the employees to decertify the Union after a year of fruitless negotiations. Reimbursement of these expenses would not be punitive, but will merely restore the status quo.

However, I am not persuaded that a proper application of the *Heck's* principle warrants granting the Union's request for reimbursement of its litigation and negotiation expenses here.

In *Retlaw Broadcasting*, 324 NLRB 1148 (1997), the Board held:

It is well settled that the assessment of costs against a Respondent is an extraordinary remedy not ordinarily imposed. *Heck's, Inc.*, 215 NLRB 765 (1974); *Tiidee Products*, 194 NLRB 1234 (1972), enf'd. as modified 502 F.2d 349 (D.C. Cir. 1974), cert. denied 421 U.S. 791 (1975). As long as the defenses raised by the respondent are "debatable" rather than "frivolous," this remedy is inappropriate, even where the Respondent had engaged in "clearly aggravated and pervasive misconduct," or a "flagrant repetition of conduct previous found unlawful." *Mt. Airy Psychiatric Center*, 230 NLRB 668, 681 (1977).

Under this standard, I find that extraordinary remedies in this case are unwarranted.<sup>99</sup>

The Union also seeks a broad Order herein requiring the Respondent "to cease and desist from violating the Act 'in any other manner'" citing *Hickmott Foods*, 242 NLRB 1357 (1979). The Board in *Hickmott Foods* stated that an order is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. While it is true that the Respondent bargained in bad faith, unlawfully encouraged employees to decertify the Union and refused to reinstate strikers, I do not believe the Respondent meets the standard under *Hickmott* and therefore a broad injunctive order is not warranted herein.

Therefore, because of the nature of the unfair labor practices found here, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

<sup>99</sup> In accord see *McGuire Steel Erection, Inc.*, 324 NLRB 221 (1997); *Adam Wholesalers, Inc.*, 322 NLRB 313 (1996). (In *Adam Wholesalers*, the Board held that a respondent's defenses will generally be considered debatable rather than frivolous, if they turn on issues of credibility.) *Contrast Harowe Servo Controls*, 250 NLRB 958 (1980); *Wallman Industries, Inc.*, 248 NLRB 325 (1980).

## CONCLUSIONS OF LAW

1. Pratt Towers, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time building service employees employed by the Respondent at its 333 Lafayette Avenue, Brooklyn, New York facility, excluding all guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been, and is now, the exclusive bargaining representative of all employees in the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. At all material times the following named persons have been agents of the Respondent, acting on its behalf, or supervisors of the Respondent within the meaning of Section 2(11) of the Act: Eunice Johnson (site manager), Valerie Brooks (board of directors president), Faythe Gaskin (assistant secretary of the board of directors), and Joan Newsome-White (board of directors' member).

6. From February 22 to March 15, 1999, the Respondent's employees, Keith Robinson, Lawrence Folkes, Theorgy Brailsford, Curtis Bailey, Angel Venzen, and Jude Obaseki engaged in a strike.

7. On March 11 and 15, 1999, the striking employees made unconditional offers to return to their former positions of employment, and the Union, on March 16, 1999, made an unconditional offer on behalf of the striking employees to return to their former jobs.

8. The Respondent has failed to carry its burden in establishing its affirmative defense that the striking employees engaged

in misconduct of sufficient seriousness to deny them reinstatement to their former positions.

9. The Respondent has failed to carry its burden in establishing its affirmative defense that the strike engaged in by the striking employees was unlawful, since its object was to compel the Respondent to sign a bargaining contract containing illegal clauses in violation of the Act and that the Union bargained in bad faith, therefore the Respondent did not have to reinstate its striking employees.

10. By unlawfully discharging and refusing to reinstate its striking employees unless and until they abandoned their support for the Union the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

11. By rendering unlawful assistance to Local 2 by seeking out and volunteering to recognize Local 2 as the bargaining representative of its unit employees, at a time when the Respondent's employees were represented by Local 32B-32J, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(2) of the Act.

12. By engaging in a predetermined and planned course of conduct designed to undermine the status of the Union as the exclusive bargaining representative of the Respondent's employees, and to convince the employees that it would be futile to continue to support the Union and in their best interests to abandon the Union, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

13. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]